NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3996

JOHN HOLLAWELL,
Appellant,

v.

FRANK D. GILLIS, Superintendent SCI Coal Township, WILLIAM WARD, ALLEN CASTOR, DAHLE BINGAMAN, SEAN RYAN, NICHOLAS MULLER, GARY LUCHT, MICHAEL WEBSTER, JOHN ENGLE, DAVID WITHERS, JOHN DOE(S), PBPP MEMBERS/EMPLOYEES, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA BOARD OF PROBATION AND PAROLE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 4:CV-99-1502)
District Judge: The Honorable Malcolm Muir

No. 01-1063

JOHN HOLLAWELL,
Appellant

v.

FRANK GILLIS, Superintendent, WILLIAM WARD, Pennsylvania Board of Probation and Parole Chairman

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 4:CV-00-1222)
District Judge: The Honorable Malcolm Muir

ARGUED JANUARY 23, 2003

BEFORE NYGAARD, AMBRO AND LOURIE,* Circuit Judges

(Filed: April 23, 2003)

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*Honorable Alan D. Lourie, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

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OPINION OF THE COURT

LOURIE, Circuit Judge.

John Hollawell appeals from the decision of the United States District Court for the Middle District of Pennsylvania denying his petition for a writ of habeas corpus. *Hollawell v. Gillis*, No. 4:CV-99-1502, slip op. at 5 (M.D.Pa. Nov. 30, 1999) (*"Hollawell I"*). Because the petition was untimely, we vacate the District Court's order and remand with instructions for the District Court to dismiss the petition. Mr. Hollawell also appeals from a second decision of the same court denying a separate petition for a writ of habeas corpus. *Hollawell v. Gillis*, No. 4:CV-00-1222, slip op. at 5 (M.D.Pa. Dec. 21, 2000) (*"Hollawell II"*). Because that decision was in error, we vacate that decision as well.

BACKGROUND

Hollawell was convicted by a Pennsylvania court for corrupt organizations offenses, bribery, and conspiracy. He was sentenced to serve between six and a half and twenty-three years in a Pennsylvania correctional facility, and he began doing so in 1990. Since his minimum term elapsed, he has been denied parole several times by the Pennsylvania Board of Probation and Parole. He has brought numerous challenges to the Board's actions. Two of those challenges are the bases for the present appeals.

First, Hollawell has alleged that the Parole Board denied him parole on the grounds of his race (white) and

comments he made criticizing the Board. More specifically, he has alleged that specific members of the Board made statements to the effect that his race, background, and criticisms of the Board were the reasons that he had not been paroled. Hollawell challenged his denial of parole on those grounds by filing a petition for mandamus in the Commonwealth Court, which rejected his petition in September 1995, *Hollawell v. Pa. Bd. of Prob. & Parole,* No. 3267 C.D.1995 (Pa.Commw.Ct. Sept. 25, 1995), and by appealing that rejection to the Pennsylvania Supreme Court, which denied his appeal in June 1996, *Pa. Bd. of Prob. & Parole v. Hollawell,* Nos. 572, 573 (Pa. June 14, 1996). Thereafter, Hollawell filed a petition for a writ of habeas corpus in the District Court in August 1999. The court denied his petition, finding that his allegations of discrimination and retaliation by the Parole Board were unsupported and that he was denied parole because of "poor institutional adjustment, concern for public safety and unfavorable recommendations from various sources, including the sentencing judge." *Hollawell I* at 3-4.

Second, Hollawell has challenged the denials of parole as being violative of the *Ex Post Facto* Clause of the United States Constitution due to a 1996 amendment to 61 Pa. Cons. Stat. § 331.1, the statute governing parole standards. At the time of his conviction, that statute read as follows:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient

> parole administration, and to that end it is the intent of this Act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

61 Pa. Cons. Stat. § 333.1 (pre-1996). In 1996, the statute was amended, giving "first and foremost" emphasis to "the safety of the public" and no longer mentioning rehabilitation of the offender:

> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison.
>
> In providing these benefits to the criminal justice system, the Board shall first and foremost seek to protect the safety of the public. In addition to this goal, the Board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control, and treatment of paroled offenders.

61 Pa. Cons. Stat. § 333.1 (post-1996).

On July 21, 1999, when Hollawell was denied parole, the Parole Board's rationale tracked the language of the amended statute: "[T]he mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole." On December 2, 1999, Hollawell challenged that denial by filing a petition for a writ of mandamus in the Commonwealth Court, arguing that the change in the statute retroactively increased his punishment in violation of the *Ex Post Facto* Clause. The Commonwealth Court dismissed the petition for lack of jurisdiction.

Hollawell v. Pa. Bd. of Prob. & Parole, No. 688 M.D.1999 (Pa.Commw.Ct. Dec. 13, 1999). Although Hollawell did not appeal that decision to the Pennsylvania Supreme Court, he did file a subsequent petition for a writ of mandamus, invoking the Pennsylvania Supreme Court's original jurisdiction and seeking the same relief on the *Ex Post Facto* ground. The Pennsylvania Supreme Court denied the petition without explanation. *Hollawell v. Ward*, No. 291 M.D. Misc. Docket entry.1999 (Pa. Mar. 27, 2000).[1]

Hollawell next filed a petition for a writ of habeas corpus in the District Court in July 2000. The court adopted *sub silentio* a magistrate's report and recommendation that Hollawell had exhausted his state court remedies before seeking federal habeas corpus relief. The magistrate found that any appeal by Hollawell of the decision by the Commonwealth Court would have been fruitless because state law apparently did not permit mandamus relief at that time. *Hollawell v. Gillis*, No. 4:CV-00-1222, slip op. at 12 (Nov. 2, 2000) (Magistrate's Report & Recommendation); *see also id.* at 10 n. 1 (noting that *Coady* was pending in the Pennsylvania Supreme Court at that time). On the merits, the court applied the *Morales* test, *viz.*, whether the change to the parole law created "a sufficient risk of increasing the measure of punishment," and determined that the change was not significant. *Hollawell II* at 4

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[1] The Pennsylvania Supreme Court subsequently held that it is within the Commonwealth Court's original jurisdiction to decide mandamus petitions raising questions whether Parole Board decisions violate the *Ex Post Facto* Clause. *Coady v. Vaughn*, 770 A.2d 287, 290 (Pa.2001). Thus, the Commonwealth Court's 1999 dismissal of Hollawell's petition for lack of jurisdiction would have been erroneous had it occurred after *Coady*.

(citing *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 509 (1995)). Looking to a related preexisting parole statute, 61 Pa. Cons. Stat. § 331.21, and more specifically its directive to protect the "interests of the Commonwealth" from "injury," the court found that the law had always directed the Parole Board to protect the public safety. *Id.* at 5-6.

Hollawell separately appealed both decisions of the District Court. We have jurisdiction under 28 U.S.C. § 1291. We heard oral arguments for both appeals together and set forth our decisions for each in this single opinion.

DISCUSSION

A. *Appeal No. 99-3996 (Discrimination and Retaliation)*

In reviewing a district court's decision on a habeas corpus petition, we review the court's legal conclusions *de novo* and any factual findings for clear error. *Ruggiano v. Reish*, 307 F.3d 121, 126 (3d Cir.2002) (citing *Rios v. Wiley*, 201 F.3d 257, 262 (3d Cir.2000)). We also review decisions regarding the timeliness of a habeas corpus petition *de novo*. *Johnson v. Hendricks*, 314 F.3d 159, 161 (3d Cir.2002) (citing *Nara v. Frank*, 264 F.3d 310, 314 (3d Cir.2001)).

Hollawell first argues that he exhausted his state court remedies by filing a mandamus petition challenging the denial of parole on discrimination and retaliation grounds. He specifically points to an adverse decision by the Commonwealth Court in September 1995 and an adverse decision on the appeal of that decision by the Pennsylvania Supreme Court in June 1996. On the merits, he argues that he has presented sufficiently detailed allegations of statements to the effect that the decisions denying parole were the product of

discrimination and retaliation so as to raise factual issues that merit discovery and a hearing.

The Commonwealth responds that Hollawell's discrimination and retaliation-based habeas corpus actions, commenced in 1999, were well past the one-year statute of limitations, which began at the time of the final adverse state court decision in 1996. Alternatively, the Commonwealth contends that Hollawell did not exhaust his state remedies by seeking relief from the state courts within the year preceding his federal action. On the merits, the Commonwealth contends that Hollawell's allegations were insufficient to justify relief, and that the Parole Board's stated reasons for denying him parole were sound and belie his claims of discrimination and retaliation.

We agree with the Commonwealth that Hollawell's habeas corpus action in the District Court was time-barred. The one-year limitations period is set by statute:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;....

28 U.S.C. § 2244(d)(1). Hollawell's brief unequivocally asserts that the relevant state court decisions occurred in 1995 and 1996. That fact was confirmed by Hollawell's

counsel during oral argument.[2] That being the case, Hollawell's 1999 federal habeas corpus petition was filed more than three years after the final state court decision and is therefore clearly time-barred. Accordingly, the District Court erred in not dismissing the petition; we therefore vacate the court's denial of Hollawell's petition in *Hollawell I* and remand for the court to enter a dismissal with prejudice. *See, e.g., Johnson,* 314 F.3d at 163 (affirming a dismissal of a habeas corpus petition as time-barred under § 2244(d)(1)); *Robinson v. Johnson,* 313 F.3d 128, 143 (3d Cir.2002) (same).

B. *Appeal No. 01-1063 (*Ex Post Facto *Violation)*

Because "the determination of whether state remedies have been exhausted and whether exhaustion should be excused involves the application and interpretation of legal precepts," we review issues of exhaustion *de novo. Hankins v. Fulcomer,* 941 F.2d 246, 249 (3d Cir.1991) (citing *Schandelmeier v. Cunningham,* 819 F.2d 52, 54 (3d Cir.1986); *Sullivan v. Cuyler,* 723 F.2d 1077, 1082 (3d Cir.1983)). Because the determination whether a change in law violates the *Ex Post Facto* Clause is a quintessentially legal question, we also review that issue *de novo. See Ruggiano,* 307 F.3d at 126.

1. *Exhaustion of State Remedies*

Hollawell preemptively argues that he properly exhausted the state remedies available to him before

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[2]Hollawell has filed a flurry of state and federal petitions, raising some uncertainty concerning which federal actions relate to which state actions. However, we believe the record and assertions of counsel at oral argument make clear that the federal petition involved in this appeal relates to the state petitions decided in 1995 and 1996.

filing for habeas corpus relief in federal court. He argues that he filed petitions for mandamus in both the Commonwealth Court and the Pennsylvania Supreme Court, but that his petitions were denied under the then-existing (pre-*Coady*) law. The Commonwealth responds that Hollawell was required to appeal the Commonwealth Court's denial to the Pennsylvania Supreme Court, rather than merely file a separate mandamus petition in the Supreme Court.

We agree with Hollawell that the exhaustion requirement poses no obstacle to our rendering a decision on the merits in this case. The exhaustion requirement, codified at 28 U.S.C. § 2254(b), is grounded in comity and affords states a full opportunity to correct constitutional violations before the federal courts consider the issues. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). A habeas petitioner gives the state courts a full opportunity to address his case by attempting to appeal through the chain of appeals to the state's highest court. *Id.* at 845 ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.").

In this case, Hollawell has apparently technically not complied with the requirement to present his *Ex Post Facto* case through the state court system's chain of appeals. Rather than appeal the Commonwealth Court's decision to the Pennsylvania Supreme Court, he filed a new petition in the Pennsylvania Supreme Court seeking a decision in the first instance. Notwithstanding that failure to appeal, we conclude that Hollawell has satisfied the exhaustion requirement. First, Hollawell filed both state mandamus petitions as a *pro se* litigant, and we are somewhat forgiving of the shortcomings of *pro se* litigants concerning such technical matters as the distinction between appellate review of a lower court's decision and

invoking the original jurisdiction of an appellate court. Second, Hollawell did obtain a decision from the Commonwealth's highest court, and it is quite possible that the Pennsylvania Supreme Court, obviously aware of the lower court's decision, treated his *pro se* petition as being equivalent to an appeal. In any event, it acted upon and denied that petition. Third, the state law at the time arguably did not permit the mandamus relief Hollawell was seeking, thus bringing him within an exception to the exhaustion requirement. *See* 28 U.S.C. § 2254(b)(1)(B). Thus, we consider that the appeal is properly before us.

2. Ex Post Facto *Violation: Merits*

In his original briefs and oral argument, Hollawell has argued that the change in the statute altered the factors to be considered by the Parole Board and thus constituted a more serious statutory change than those previously upheld as nonviolative of the Constitution. According to Hollawell, the old statute gave primary importance to the rehabilitation of the offender, while the amended statute introduced a new condition - "protection of the safety of the public" - and further made that new condition the paramount one. Hollawell contends that the new condition is truly new and not merely a restatement of 61 Pa. Cons. Stat. § 331.21, which directed the Parole Board to protect the "interests of the Commonwealth." Finally, Hollawell contends that parole release rates have decreased significantly since the change in the law, indicating that the change has increased the penalties for criminal violations.

In its original briefs and oral argument, the Commonwealth has responded that parole decisions have always been at the discretion of the Parole Board and that the amendment therefore did not amount to a "law" for *Ex Post Facto* purposes. The Commonwealth also

contends that, even before the amendment, the Parole Board was obliged to consider public safety under the "interests of the Commonwealth" prong of § 331.21. Finally, the Commonwealth disputes the accuracy and significance of Hollawell's empirical data concerning parole rates.

After oral argument in this case, this court issued a decision in *Mickens- Thomas v. Vaughn*, 321 F.3d 374 (3d Cir.2003), holding that the statutory change did constitute an *Ex Post Facto* violation with respect to an individual already sentenced. At our direction, the parties submitted supplemental briefs addressing the impact of *Mickens-Thomas* on this case. Hollawell's supplemental brief contends that *Mickens-Thomas* confronted the identical issue presented in this case, and squarely rejected the same arguments that the Commonwealth now advances. According to Hollawell, he should receive a new parole hearing applying the pre-amendment standards, just as Thomas received. The Commonwealth's supplemental brief makes three contentions. First, *Mickens-Thomas* does not reach the exhaustion issue present in this case. Second, the decision in *Mickens-Thomas* rests upon an extensive factual record that is not present in this case. Third, according to the Commonwealth, *Mickens-Thomas* was incorrectly decided and should be reconsidered.

The Constitution forbids Congress and the states from enacting *Ex Post Facto* laws. U.S. Const. art. I, § 9, cl. 3, § 10, cl. 1. The relevant *Ex Post Facto* Clause reads as follows: "No State shall ... pass any ... ex post facto Law...." *Id.*, § 10, cl. 1. The Supreme Court of the United States has interpreted that clause to prohibit "laws that retroactively alter the definition of crimes or increase the punishment for criminal acts." *Morales*, 514 U.S. at 504 (quotations omitted).

As an initial matter, we agree with Hollawell that 61 Pa. Cons. Stat. § 331.1 constitutes a "law" for *Ex Post Facto* purposes. It is legislation that clearly directs which factors the Parole Board must consider in exercising its discretion to grant or deny parole. Although one does not have a constitutional right to parole, and a decision to grant or deny parole to a Pennsylvania inmate is a discretionary one that is not subject to direct judicial review, *Coady*, 770 A.2d at 289, a parole decision can be collaterally attacked on constitutional grounds, including the *Ex Post Facto* Clause. Indeed, the Supreme Court has recently considered two appeals concerning when a retroactive change in parole rules violates the *Ex Post Facto* Clause. In *Morales*, the Court upheld a California law that authorized its Parole Board, after the first parole hearing, to hold following parole hearings in two or three years rather than one year, provided that the Board found that the prisoner would not reasonably be expected to be suitable for parole in the next year or two, respectively. 514 U.S. at 507. In *Garner v. Jones*, the Court upheld a similar Georgia law that allowed the Parole Board to increase the interval between hearings from a maximum of three years to eight years. 529 U.S. 244, 247 (2000). Thus, changes in the law that effectively extend the time before parole rehearings can occur do not necessarily violate the *Ex Post Facto* Clause.

The test set out in *Morales* for determining whether a parole law amendment violates the *Ex Post Facto* Clause involves a two-step inquiry. First, the court must determine "[w]hether [the amendment] produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, 514 U.S. at 509. If not, then the amendment may nonetheless still violate the *Ex Post Facto* Clause if the challenger "demonstrate[s], by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will

result in a longer period of incarceration than under the earlier rule." *Garner,* 529 U.S. at 255.

Regarding the first inquiry, the Court in both *Morales* and *Garner* took care to expressly distinguish the amendment before it - amendments relating to the timing of an offender's parole hearings - from an amendment relating to "the standards for ... determining his suitability for parole." *Morales,* 514 U.S. at 507; *Garner,* 529 U.S. at 250. This case presents a question of that latter type, *viz.,* whether retroactive application of a parole statute amendment expressing for the first time that "the board shall first and foremost seek to protect the safety of the public" violates the *Ex Post Facto* Clause.

In *Mickens-Thomas,* this court answered the question affirmatively. Thomas had been serving a life sentence, without the possibility of parole, for the rape and murder of a twelve-year-old girl in 1964. 321 F.3d at 376. Governor Casey commuted the life sentences of Thomas and 26 others, thereby rendering them eligible to apply for parole. *Id.* at 377. Thomas applied for parole three times between 1996 and 2000. *Id.* at 380-83. Despite release recommendations from Department of Corrections staff, Thomas's participation in counseling and therapy, and favorable psychiatric evaluations, the Board denied his application each time, referring in the first two denials to Thomas's "assaultive instant offense" and "very high assaultive behavior potential," *id.* at 381-82, and stating in the final denial that "the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole," *id.* at 382. Of all the prisoners who had had their life sentences commuted by then-Governor Casey, Thomas was the only one not released on parole. *Id.* at 385.

The court in *Mickens-Thomas* held that Pennsylvania's change to the parole statute altered the manner in which the Parole Board weighed public safety in making parole decisions:

> The record is convincing that after 1996, the Board applied to the public safety interest far greater weight. The evidence here demonstrates that since 1996, the Board has given special weight to the risk to public safety. Pre- 1996, a prisoner could be denied parole because of public safety concerns only if those concerns together with other relevant factors outweighed, by a preponderance, the liberty interests of the inmate. The 1996 policy change placed first and foremost the public safety to the disadvantage of the remaining liberty interest of the prisoner.

Id. The court described the statistical evidence as "staggering," noting that in 266 historical instances of commuted life sentences, Thomas was the only one not granted parole within his first two attempts. *Id.* The court accordingly ordered that Thomas's parole application be remanded to the Parole Board for review under the pre-1996 rules. *Id.* at 393.

We are aware of the recent decision of the Pennsylvania Supreme Court considering whether the statutory amendment violates the *Ex Post Facto* Clause: *Winklespecht v. Pa. Bd. of Prob. & Parole,* 813 A.2d 688, 692 (Pa.2002). The Court there held that the Pennsylvania amendment was merely a new expression of a standard that had previously been inherent in the law. However, *Mickens- Thomas* is a precedent of this court, binding unless overruled *en banc* or by the Supreme Court of the United States, and the Commonwealth's arguments attempting to distinguish *Mickens-Thomas* are not convincing. First, as explained above, we do not accept the Commonwealth's contention that we need not reach the merits of Hollawell's *Ex Post*

Facto claim because he has not exhausted his state remedies. Second, the Commonwealth's contention that the *Mickens- Thomas* decision is predicated on a factual record not developed in this case, although true, does not have the effect that the Commonwealth urges. *Mickens-Thomas* clearly holds as a legal matter that the Pennsylvania statutory change violates the *Ex Post Facto* Clause. Moreover, to the extent that that holding is premised on factual evidence of the amendment's practical effect, Hollawell might rely on that same evidence and achieve the same result if we were to needlessly remand this case for factual development in the District Court. Third, and finally, this panel of the court cannot, as the Commonwealth would like, overrule *Mickens-Thomas* even if we might disagree with it. It is binding precedent that we must follow.

Accordingly, we vacate the decision of the District Court in *Hollawell II* and, as the *Mickens-Thomas* panel did, 321 F.3d at 393, remand for the District Court to order the Pennsylvania Board of Probation and Parole to re-adjudicate Hollawell's parole application applying the pre-1996 statute and corresponding rules.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN HOLLAWELL, Petitioner	:	No. 4: CV-00-1222
	:	Petition filed
v.	:	7/10/00
	:	
FRANK D. GILLIS, ET AL., Respondents	:	(Judge Muir)

ORDER
December 21, 2000

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On July 10, 2000, John Hollawell, an inmate at the State Correctional Institution, Coal Township, Pennsylvania, ("SCI-Coal Township"), filed a petition for writ of habeas corpus. Named as Respondents are Frank D. Gillis, the superintendent of SCI-Coal Township and William Ward, the Chairman of the Pennsylvania Board of Probation and Parole. Hollawell paid the $5.00 filing fee.

In the petition for writ of habeas corpus, Hollawell who is serving a 6 ½ to 23 year sentence requests that the court direct the Parole Board to grant him parole. Hollawell's minimum sentence expired on November 2, 1994, and his maximum sentence will expire on May 2, 2011. The above-captioned case was assigned to us but referred to Magistrate Judge J. Andrew Smyser for preliminary consideration.

On October 13, 1999, Magistrate Judge Smyser issued a report in which he recommended that Hollawell's

petition for writ of habeas corpus be denied. Hollawell filed objections to the report of Magistrate Judge Smyser.

When objections are filed to a report of a magistrate judge, we make a de novo determination of those portions of the report or specified proposed findings or recommendations made by the magistrate judge to which there are objections. United States vs. Raddatz, 447 U.S. 667 (1980); 28 U.S.C. § 636(b)(1); Local Rule 72.31. District judges have wide discretion as to how they treat recommendations of the magistrate judge. Id. Indeed, in providing for a de novo review determination rather than a de novo hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound discretion, chooses to place on a magistrate judge's proposed findings and recommendations. Id. See also Mathews vs. Weber, 423 U.S. 261, 275 (1976); Goney vs. Clark, 749 F.2d 5, 7 (3d Cir. 1984).

On July 21, 1999, the Pennsylvania Board of Probation and Parole denied Hollawell parole. The Parole Board stated:

> Following an interview and review of your file the Pennsylvania Board of Probation and Parole has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole. You are therefore refused parole and ordered to: be reviewed in or after September 2000.

In his petition, Hollawell alleges that the Parole Board's July 21, 1999, denial of parole was a violation of the Ex Post Facto Clause of the United States Constitution. Specifically, he claims that the Parole Board applied a 1996 amendment to 61 P.S. § 333.1 when considering him for parole.

At the time Hollawell committed his offenses, 61 P.S. § 333.1 stated as follows:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient parole administration, and to that end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

Section 331.1, as noted above, was amended in 1996 and now states as follows:

> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison.
>
> In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public. In addition to this goal, the boards hall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

Hollawell contends that the amendment which includes the provision that the Parole Board "shall first and

foremost seek to protect the safety of the public" has been applied to him in violation of the Ex Post Facto Clause.

The United States Constitution forbids ex post facto laws. U.S. Const. Art. I, § 9 & 10. The Ex Post Facto Clause is directed at laws that retroactively alter the definition of a crime or that increase the punishment for criminal acts. California Dept. Of Corrections vs. Morales, 514 U.S. 499, 504 (1995). Before a court may conclude that a law violates the Ex Post Facto Clause the law must be shown to (1) be retrospective and (2) be disadvantageous to the offender affected by it. Weaver vs. Graham, 450 U.S. 24, 29 (1981).

Retroactive changes in laws governing parole may in some instances violate the prohibition against ex post facto laws. Garner vs. Jones, 120 S.Ct. 1362, 1367 (2000). However, "the Ex Post Facto Clause should not be employed for 'the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures.'" Id. At 1367 (quoting *Morales*, supra, 514 U.S. at 508). The Ex Post Facto Clause does not forbid every legislative change that has any conceivable risk of affecting a prisoner's punishment. *Morales*, supra, 514 U.S. at 508. The most important inquiry is whether the change creates "a sufficient risk of increasing the measure of punishment attached to the covered crimes." Id. at 509. The prisoner "must show that as applied to his own sentence the law creates a significant risk of increasing his punishment." Garner, supra. 120 S.Ct. at 1370.

Furthermore, in reviewing a change in a state law relating to parole all of the statutory procedures relating to parole must be considered to determine whether the amended statute is more onerous than the original parole procedures. Crowell vs. U.S. Parole Comm'n, 724 F.2d 1406, 1409 (3d Cir. 1984). In the present case, although

the old version of 61 P.S. § 331.1 did not contain a directive that the Parole Board protect the public, protection of the public was always a factor the Parole Board was obliged to consider. 61 P.S. § 331.21 which was in existence at the time Hollawell committed his offenses states as follows:

> The Board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment, whenever in its opinion the best interests of the convict justify or require his being paroled and *it does not appear that the interests of the Commonwalth will be injured thereby.*

(Emphasis added.) Both before and after the 1996 amendment to § 331.1, the Parole Board was charged with protecting the public. The law in this respect did not change.

Retroactive legislation is subject to challenge only if it involves a deprivation of legitimate expectations or upsets settled transactions. General Motors Corporation vs. Romein, 503 U.S. 181, 191 (1992). Prior to the 1996 amendment Hollawell had no legitimate expectation that the Parole Board would disregard the possible danger to the community if he were released on parole. Consequently, Hollawell cannot establish a violation of the Ex Post Facto Clause.

Hollawell has also objected to the manner in which the Parole Board responded to the petition for writ of habeas corpus. The Parole Board initially responded to the petition by filing a motion to dismiss. Magistrate Judge Smyser denied that motion and directed that the Parole Board file a response. We see no impropriety in the

manner in which the Parole Board initially responded to Hollawell's petition.

Hollawell also claims that Magistrate Judge Smyser showed preferential treatment to the Parole Board. Magistrate Judge Smyser rejected several of the Parole Board's contentions, including that Hollawell failed to exhaust state court remedies. Hollawell's claim that Magistrate Judge Smyser showed preferential treatment to the Parole Board is devoid of any merit whatsoever.

The report of Magistrate Judge Smyser is free from error. Because we find no error in Magistrate Judge Smyser's report we shall adopt it as our own and deny Hollawell's petition for writ of habeas corpus.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The report of Magistrate Judge Smyser filed November 2, 1999, is adopted in toto.

2. Hollawell's petition for writ of habeas corpus is denied.

3. The Clerk of Court shall close this case and send a copy of this order to Magistrate Judge Smyser.

4. Any appeal from this order will be deemed lacking in probable cause, i.e., a substantial showing of the denial of a constitutional right, and a certificate of appealability will not issue.

/s/
MUIR, U.S. District Judge

PRECEDENTIAL
Filed February 21, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-2047 & 02-2213

LOUIS MICKENS-THOMAS
Appellant in No. 02-2213

v.

DONALD VAUGHN, SUPERINTENDENT;
PENNSYLVANIA BOARD OF PROBATION AND PAROLE;
THE PENNSYLVANIA BOARD OF PARDONS; THE
ATTORNEY GENERAL OF THE STATE OF
PENNSYLVANIA

Pennsylvania Board of Probation and Parole
Appellant in No. 02-2047

Appeal from the United States District Court for the
Eastern District of Pennsylvania
D.C. No.: 99-cv-06161
District Judge: Honorable Ronald L. Buckwalter

Argued: December 19, 2002
Before SLOVITER, McKEE, and ROSENN, Circuit
Judges
(Filed February 21, 2003)

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OPINION OF THE COURT

ROSENN, Circuit Judge:

This appeal has its genesis in the material modification of parole laws by the Pennsylvania legislature in 1996 and corresponding changes in the parole decisionmaking policies of the Pennsylvania Board of Probation and Parole ("Board").[1] As a consequence, the post-1996 parole regime placed primary consideration on the risk to public safety by the parole petitioner as the

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[1]The Board is the only named party electing to participate in this appeal, and the only party against whom our judgment in this case applies.

dominant factor in evaluating parole applications. The United States District Court for the Eastern District of Pennsylvania held that the Board retroactively applied this policy change adversely to the parole applications of Louis Mickens-Thomas ("Thomas"), in violation of the Ex Post Facto clause. The Commonwealth timely appealed; Thomas cross-appealed on his claim that the Board violated his due process rights when it denied his parole applications. We affirm.[2]

I.

A. Pre-1996 Parole Considerations in Pennsylvania

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[2]The District Court exercised jurisdiction under 28 U.S.C. § 2254(a). We have appellate jurisdiction under 28 U.S.C. § 2253. Section 2253 requires that, in habeas appeals where the alleged unlawful detention arises out of process issued by a state court, a certificate of appealability is required before appeal by a habeas petitioner will be heard. A certificate of appealability was issued by the District Court, and thus our jurisdiction is proper. Moreover, such a certificate may be unnecessary because the Commonwealth initiated the appellate proceedings, and the petitioner merely filed a cross-appeal. See *Rios v. Wiley*, 201 F.3d 257, 262 n. 5 (3d Cir.2000). Although it appears state court recourse was exhausted by an appeal to the Pennsylvania Supreme Court, that case is not part of this record. However, exhaustion is not jurisdictional and is waivable. *Narvaiz v. Johnson*, 134 F.3d 688, 693 n. 1 (5th Cir.1998). Inasmuch as the Board has not made an issue thereof, exhaustion is deemed waived. We exercise plenary review in a habeas proceeding over a district court's legal conclusions, and we review factual findings for clear error. *Rios*, 201 F.3d at 262. The relevant facts in the case before us are largely undisputed, and our decision rests upon the application of the Ex Post Facto clause to the facts at issue. Therefore, our review of the District Court is plenary.

Thomas is currently serving a life sentence for the 1964 rape and murder of a 12-year-old girl in Philadelphia, Pennsylvania. The parties agreed to vacate the original guilty verdict because of the unreliability of the expert whose testimony connected fibers and microscopic particles found on the victim to Thomas. In 1967, the state trial court granted Thomas a new trial; in 1969, he was again convicted.[3] His second conviction was upheld by the Pennsylvania Supreme Court in 1972. However, Thomas still professes innocence. Thomas is presently 74-years-old and has been in prison for nearly 40 years. His current efforts to seek release on parole have garnered the strong support of prisoner advocates, incurred the equally vehement opposition of the Philadelphia District Attorney, and have attracted considerable media scrutiny.

Life sentences in Pennsylvania presumptively exclude any possibility of parole. The only exception occurs when the governor-appointed Pardons Board recommends commutation of the inmate's sentence by majority vote, and the Governor subsequently approves the commutation. Thomas was one of only 27 sentences commuted by former Governor Casey out of nearly 3000 life terms being served during his tenure as governor. By the terms of his commutation. Thomas became eligible for parole on July 21, 1996. In recommending commutation, the Pardons Board noted Thomas's attainment of a college degree, his participation in Alcoholics

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[3]More specifically, the first conviction was rejected because the prosecution's lead witness, a technician who matched fibers and debris from Thomas's shoe repair shop to those found on the girl's body, was found to have falsified her credentials and to have perjured herself in another case. At the second trial, the technician's supervisor corroborated the technician's testimony and vouched for the correctness of the analysis.

Anonymous, his participation in sex-offender therapy, the support of the Corrections Department, the long length of time served, the numerous recommendations from scholars, religious, and community leaders, and Thomas's overall maturity and stability.

Following a commutation, a prisoner seeking to be released must still submit to the same parole procedures applicable to all other prisoners. Furthermore, the parole must first be approved by the Board, which virtually has unreviewable power to grant or deny the parole application. Around the time of Thomas's eligibility for parole, new appointments of then-Governor Ridge were placed on the Board in 1995;[4] a parolee from the Pennsylvania prison system was arrested for murder in New Jersey in 1995; and in early 1996 a Pennsylvania Senate committee, in view of the New Jersey arrest, strongly recommended that the Board place added emphasis on community safety. In December 1996, Pennsylvania enacted a change in its law concerning the Board's mission, which arguably placed greater emphasis on public safety as a criterion for parole release.

In December 1996 the Pennsylvania legislature modified the law governing parole in Pennsylvania. The new language, inserted into the aspirational introductory provision of the Pennsylvania parole statutes, provides that the public safety must be considered "first and foremost" in the Board's execution of its mission. The

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[4]Three of five members of the Parole Board were Governor Ridge appointees in 1995. In 1997, after changes in parole laws increased the size of the Board, six out of eight were Ridge appointees.

relevant statute, in its post-1996 form, provides as follows:[5]

> § 331.1. Public policy as to parole
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> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison. In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public. In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

61 P.S. § 331.1

The 1941-1996 statute, in effect at the time of Thomas's conviction, made no specific mention of public safety. It provided:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject or sentenced to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment, and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and

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[5]This provision is a preface to a comprehensive set of rules governing parole in Pennsylvania. Other provisions too were changed in 1996, but none materially for the purposes of this case.

> efficient parole administration, and to that end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

To assess this modification of the statute, one must regard this change in the context of recent policy statements issued by the Board and other government officials. Other events coincident with the 1996 revision must also be considered to determine whether, in practice, the parole policies of the Commonwealth have undergone any substantive changes.[6] The Board's 1989 Manual of Operations and Procedures recognized that "[p]robation and parole services must consider that offenders can change their behavior patterns when desirous, capable, and given the opportunity, help, dignity, and respect they deserve as human beings." App. 284. The Manual goes on to state that, in considering an inmate for parole, the Board must "weigh[ ] numerous factors relative to the welfare of the client and the safety of the community," including seriousness of the offense; length of the sentence; institutional adjustment (behavior and program adjustment); and assessment of the effect of rehabilitation services while incarcerated. Whether the individual can be safely supervised in the community, personality characteristics, any history of family violence, strength of the parole plan (home and employment), testimony from victims, and opinions of the sentencing judge and prosecuting attorney must also be considered.

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[6]The Board argues that the statutory provision pertains only to supervision of inmates previously granted parole, and not to the determination of parole eligibility. However, even if this were so, the plain language of the statute is merely one barometer of a change in parole policy. Accordingly, we look to all the Board's actions and statements of policy to determine how it interpreted the statutory provisions.

In reaching its parole decision, "[t]he Board ... feel[s] that an individual should be given every consideration for parole at the expiration of the minimum sentence." App. 285. The 1990 Board-authored "Parole Decision Making Guidelines: A Statement on Policy Procedure and Philosophy," stated that "[a]n eligibility for parole expresses a philosophy of presumed release unless information reviewed demonstrates by its preponderance that the public safety interests of the community outweigh the liberty interests of the inmate." App. 243.

A decisional protocol called the "Parole Decision Making Guidelines" played a critical role in the Board's decisionmaking process pre-1996. The Guidelines provided an objective prediction of the likelihood of a successful parole by assigning numerical values to various criteria, based on historical patterns of parolee recidivism rates. According to the Board authored 1991 "Guidelines: A Special Report Prepared for the House Judiciary Committee," the Guidelines considered factors which, based on a study of past instances of recidivism, were predictors of future recidivism in potential parolees. App. 256. For example, historically, those convicted of theft offenses have high recidivism rates. Thus, they are assigned a higher score; similarly, substance abusers are high recidivists, and correspondingly, they have higher scores assigned in the Guidelines. If enough of these negative predictors are present, the aggregate score will fall above a threshold value, and the Guidelines will recommend against parole. App. 246.

In addition to risk of recidivism, "risk to the community" is also a relevant factor under the Guidelines in determining whether parole is warranted. App. 252. Thus the Guidelines, in addition to calculating the risk of recidivism, add additional points for offenders whose post-parole conduct might include violent behavior, categorizing them as having "high assaultive behavior

potential." App. 52. Therefore, a person who initially committed a violent crime will be evaluated as a parole candidate under the Guidelines, based upon his or her risk to the public as a function of both the likelihood of recidivism and the severity of the crime he or she might commit as a recidivist. The Board's 1990 Statement on Policy Procedure and Philosophy notes that

> [i]nherent in the concept of risk management is the notion that some crimes, although less likely to be repeated, have more serious consequences than others if repeated. In other words, although some offenders may be low risk from the viewpoint of recidivism and parole supervision failure, the stakes are high in terms of protecting the public if their new crime is violent or serious in nature. App. 246.

According to the House Judiciary Report, the Guidelines are "related to an empirically sound, criterion-referenced policy assessment which evaluates each inmate in terms of criminal justice policy and normative past practice in parole decision making." App. 256. Although the Guidelines aspire to objectivity in parole decision making, the Board periodically has countermanded their recommendations. The 1990 Statement on Policy, Procedure and Philosophy declared that the Guidelines protocol typically determined "approximately eighty percent of the decisions rendered." App. 247. The Statement notes, however "that the structuring of discretion does not eliminate it; the burden of the decision remains with the decision maker to evaluate the merit of each case." App. 249.

Thus, before 1996, about 20% of such decisions were decided contrary to the Guidelines recommendation. Nonetheless, a discretionary Guidelines departure must give full weight to all the factors, both for and against release. The Report stated that decisions which

countermand the Guidelines are "rarities," and "require written explanation to justify the policy exception." In reaching a decision outside the Guidelines, the Board cannot merely recite factors already incorporated in the Guidelines analysis; instead it must consider "consequential characteristics" of the applicant that are "objectively unique" to the factors already incorporated into the Guidelines analysis.[7] App. 254. A Guidelines worksheet is provided along with the formal numerical protocol, to permit elucidation of non-Guidelines factors reached in a parole decision, as well as a checklist (Part IV.B. of the Guidelines) for designation of common non-Guidelines factors which may have been significant in reaching a decision contrary to the Guidelines recommendation.[8]

In early 1995, Robert "Mudman" Simon, who had been released on parole from his Pennsylvania prison sentence, was arrested and charged with murder in New Jersey.[9] In mid-1995 Simon's release led to the publication of a "System-Wide Assessment" of the Board,

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[7]Factors considered within the Guidelines analysis include substance abuse, prison misconduct, nature of the underlying offense, and victim injury.

[8]These factors include the presence of psychotic or dangerous behavioral characteristics manifested during the parole interview; recent psychiatric reports causing concern; a pattern of habitual offense of assaultive crimes; or an unfavorable recommendation from the Department of Corrections staff.

[9]Former Governor Ridge made a campaign issue of the commutation and release of Reginald McFadden, who also ended up killing again upon his parole in 1994. This was considered by some to be instrumental in the defeat of Ridge's opponent, then-Lt. Governor Singel, who, as a member of the Pardons Board, had voted to release McFadden.

by the Pennsylvania Inspector General, in which it was determined that more emphasis on public safety and on the nature of the underlying crime was needed in making parole decisions. The System-Wide Assessment noted that the Board management generally "has emphasized [inmate] interests over community protection," and that one faction of Board officials perceives "reintegration into society [as] the primary mission," while another faction "focuses ... on the protection of society." App. 297.

The Chairman of the Pennsylvania Senate Judiciary Committee, reporting on the investigation of the parole of Simon, published in February 1996, noted that following a 1989 prison riot in Pennsylvania, "reduction in prison overcrowding through the parole process became an objective of [the Board] coequal with assuring public safety." App. 326. The Report also noted that the Board recently "has set out to establish public safety as a priority including a more careful review of parole eligible cases." App. 343. Accordingly, the Report recommended that "[e]xisting statutes and policies should be looked at, amended, restated and/or purged as necessary to effectuate the *new corrections philosophy* of Pennsylvania [emphasizing] *public safety*...." App. 351 (emphasis added.)

The Board's self-assessment report, entitled "Fiscal Years 1995-1997 Biennial Report," stated that "[i]n recent years, the Governor and General Assembly have mandated through statute that the foremost concern for the Board must be the protection of the safety of the public...." The Report went on to note recent "heightened awareness and concern for public safety," which prompted it to institute more careful review procedures for cases involving "violent offenders." App. 219. Thus, both the Judiciary Committee Report of February 1996 and the contemporaneous Biennial Report gave public

notice that henceforth the "foremost concern" of the Board would be the safety of the public.

B. Thomas's Parole Applications

We now turn to the effect of the Board's new policy on Thomas's parole application. When Governor Casey commuted Thomas's sentence, he authorized the Department of Corrections to "prerelease" Thomas, presumably into a transitional facility, prior to Thomas's parole-eligibility date. This the Corrections Department declined to do. App. 663. Then, in the Board's first review of Thomas's case in September 1996, it also declined to parole him on the ground that, under the new law passed in 1995, "prerelease" was made a necessary precondition of parole. The Commonwealth Court heard Thomas's mandamus action in which he sought to direct the Board to hear his parole petition. In that case, the Board conceded that its application of the "prerelease" law violated the Ex Post Facto clause. The court remanded the case to the Board, and ordered it to hear the merits of the parole application and issue its decision within 10 days. See *Mickens-Thomas v. Pennsylvania Board of Probation and Parole,* 699 A.2d 792 (Pa.Commw.Ct.1997).

Soon thereafter, in August 1997, the Board issued its decision, relying in part on its Decision Making Guidelines to reach a conclusion as to parole eligibility.[10] Thomas received a Guidelines-based recommendation for release, App. 432, along with the recommendations of all voting Department of Corrections institutional staff,

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[10]The Guidelines manual states that they were "designed to represent observable standards of justice in making decisions and to link behavior with societal sanctions in a clearer manner.... A process of structured review acts to balance the inmate's liberty interest with the interests of society for a safe and secure community."

including the prison counselor and housing officer. See Department of Corrections Vote Sheet, March 11, 1996, App. 631. Thomas demonstrated his participation in pre-release counseling, including Alcoholics Anonymous and sex offender therapy, as well as participation in college courses and job training. Thomas also had post-release support networks in place. App. 44. Nonetheless, the Board denied Thomas parole in 1997. The Board stated its reasons for the denial in a formal letter to Thomas called the "Board Decision." The reasons given were as follows: "Assaultive instant offense. Very high assaultive behavior potential. Victim injury. Unfavorable recommendation from District Attorney. Conviction of prior assault offense." App. 441. Many of these factors were automatic designations; for example, Thomas's past crime was a sex offense, which caused him to be automatically classified on the Board Decision as having "very high assaultive behavior potential." App. 52; Board Reply Brief 14.

The Board's 1997 Decision urged Thomas to secure the following before his next application review: investigation of a home plan; the availability of out-patient sex-offender treatment; participation in a program plan prescribed by Department of Corrections officials; maintenance of a good conduct record; a continuing institutional recommendation for parole; and an evaluation by mental health professionals, with experience with sex offenders. The Board made these recommendations in spite of Thomas's apparent compliance with all of the Board's suggestions prior to the hearing. For example, he had a good conduct record and the endorsement of prison staff.

The Board urged a psychiatric examination, despite the existence of a pre-commutation 1993 psychiatric

report supporting Thomas's release.[11] There were other psychological evaluations in his file that did not contraindicate release. Although Thomas had engaged in sex offender therapy, there is some indication, based on handwritten notes on the Board's decision making worksheet, that the Board may have been troubled by Thomas's presence in a "deniers" group--those who deny responsibility for the underlying offense-- rather than an "admitters" group App. 434. The Board Decision makes no specific mention of the admitter-denier distinction, and its internal notes make only passing mention of the issue.[12] Later, in 1997, the Pennsylvania Supreme Court heard Thomas's habeas petition but summarily denied it.

Thereafter, Thomas apparently complied with all of the Board's prerequisites stated in its 1997 Decision. He maintained the positive recommendation of corrections authorities, who once more unanimously recommended his release and noted that he was in compliance with treatment programs. The prison counselor, corrections officer and psychologist all endorsed his release. App. 634. He continued to participate in a sex-offender therapy program--although it was a "deniers" program--along with an Alcoholics Anonymous program. Post-release support networks were in place. And the Guidelines assigned

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[11]In particular, the Board seemed concerned, in its 1997 Guidelines worksheet, that Thomas had only undergone psychological, and not psychiatric evaluations. This 1993 report, authored by a psychiatrist, belies the Board's claim that Thomas had never received a psychiatric evaluation.

[12]The Board is not required to give every reason for its denial on the Board Decision. App. 248. However, its internal notes fail to show that it considered the admitter-denier problem to be a serious matter. The issue is merely mentioned in a neutral way.

Thomas a risk- assessment score which militated in favor of release. App. 424.

Despite his compliance with essentially all of the Board's conditions, it again denied parole in March 1998, stating: "Assaultive instant offense. Very high assaultive behavior potential. Victim injury. Your need for counseling and treatment." App. 440. In this latest Board Decision, it again advised Thomas to seek counseling and treatment, to participate in prescribed programming, to maintain a clean record and obtain institutional recommendation for the purposes of his next application. Unlike the 1997 decision, the 1998 decision recommended no specific sex offender treatment, nor mentioned in its internal decision making worksheet that Thomas was in a "denier" group. Moreover, despite the comment that Thomas needed "counseling and treatment," psychiatric and psychological evaluations did not contraindicate his release. Presumably in response to the 1997 Board Decision's admonition that Thomas needed to be evaluated by a mental health professional, the Board noted, in its worksheet, that a 1998 psychological evaluation showed Thomas to be an "average risk candidate." App. 426. The Department of Corrections psychologist, in the 1998 Vote Sheet, noted "No Psychological Contraindications" for release. App. 634.

A 1996 psychological evaluation did show an "antisocial personality," and "possible sexual preoccupation and psychosexual immaturity." App. 623. However, the decisionmaking worksheet does not reflect that the Board was deeply concerned with those findings, and instead only made mention, in a handwritten notation, of the 1998 psychological report's conclusion that Thomas was an "average risk candidate." No notation was made of two earlier psychological evaluations, which had more clearly favored release. One 1993 report called

Thomas "a good candidate for commutation from the psychological perspective." App. 649a. A second 1993 psychiatric report added there was no "psychiatric contraindication [to commutation]" and that Thomas "has developed significantly during his years of imprisonment." App. 650. In December 1999, Thomas sought a writ of habeas corpus in the United States District Court.

Again, the Board denied his parole in 2000, during the pendency of these habeas corpus proceedings. The Board gave as its reason the cryptic statement that it "has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole." App. 439. Again, all voting members of the Department of Corrections institutional staff, including his counselor and work supervisor, unanimously recommended his parole. App. 624. Again, he demonstrated a continued record of good conduct in prison and participation in sex offender therapy and all other programming prescribed by the Department of Corrections. Nonetheless, the Board denied parole. Again, the Board advised Thomas to maintain his Department of Corrections recommendation as a precondition for consideration at his 2002 parole hearing. But, in 2000 the Board revived its 1997 recommendation that Thomas should undergo sex offender therapy as a suggested pre-condition for release. Handwritten notes again show that the Board may have been concerned that he was in a "denier" group — although, once more, no mention of this concern is made in the formal Board Decision. The lack of admitter therapy is simply stated in a neutral, non-critical way in the Guidelines worksheet. App. 415.

Finally, although the decision-making guidelines had assigned Thomas a favorability score that counseled in favor of parole on both the 1997 and 1998 applications,

the 2000 decision, despite no evidence of changes in his situation, reached a different outcome. App. 414. The Board interviewer classified Thomas as a habitual substance abuser on the Guidelines form, which increased Thomas's risk score by 3 and placed him in an unfavorable category for release. The Board did not indicate why it made this material alteration to what appears to be a boilerplate risk-assessment protocol. Thomas apparently did have a record of alcohol abuse prior to his incarceration in 1964 (for which he attended Alcoholics Anonymous while in prison) but it is unclear why, if past alcohol abuse over forty years ago was a relevant factor, it had not been considered on his two prior Guidelines evaluations.

Moreover, the Guidelines were modified since his last application, with a score of 2 now added to Thomas's overall score as a result of "Victim Injury" (the past two evaluation forms assigned only a score of "1" for Victim Injury). As a direct result of these changes Thomas's score ascended to nine, placing him in a category exceeding seven. Therefore, the Guidelines contraindicated parole. In summary, the Board denied Thomas parole a total of three times, in 1997, 1998 and 2000, although he complied each time with all of the Board's recommendations, except for his continued enrollment in the deniers group. The Board denied parole to Thomas alone of all 266 prisoners whose life sentences had been commuted.

In Thomas's current habeas petition, he alleges that the Board denied his parole in violation of the Ex Post Facto clause, by applying retroactively the revised December 1996 parole statute. According to Thomas, he had a constitutional expectation that his parole petition would be evaluated under the laws in effect when he was convicted. The District Court agreed that the Board violated the Ex Post Facto clause by applying the 1996

statutory mandate. However, the Court declined to rule outright that Thomas would have been paroled under the prior rule; instead, it remanded the case to the Parole Board to rehear the matter under the pre-1996 laws. Thomas also asked that the District Court order his release on the grounds that his due process rights were violated. The District Court held that, although Thomas had complied with all the seeming prerequisites for relief as prescribed by the Board, the presence of any evidence sufficient to show that the Board based its decision on a rational and good faith exercise of discretion, vindicated its action. Thus, the District Court concluded, there was no due process violation. See *Mickens-Thomas v. Vaughn*, 217 F.Supp.2d 570 (E.D.Pa.2002).

The District Court remanded the case to the Board to apply its pre-1996 parole policies to the Thomas petition. The Board appealed, and Thomas cross- appealed, on the denial of his due process claim and on the court's failure to grant him release outright as a result of the Ex Post Facto violation.

II. Ex Post Facto Violation

A. The New Parole Policy of 1996

The Ex Post Facto clause of the United States Constitution applies to a statutory or policy change that "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 506 n. 3 (1995). A new law or policy violates the Ex Post Facto clause (1) when it is retrospective, i.e., when it "appl[ies] to events occurring before its enactment," and (2) when it "disadvantage[s] the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981); see *Coady v. Vaughn*, 251 F.3d 480, 488 (3d Cir.2001). As to the first criterion for an Ex Post Facto violation, the Board strenuously

argues in its brief (p. 14) that "the 1996 amendments ... did not change the Board's standards for determining parole." First, it asserts that Pennsylvania's statement of public policy for parole, 61 P.S. § 331.1, refers to the supervision of parolees, rather than to conditions of release.

The foregoing argument has little merit. The statute unequivocally has been interpreted by Pennsylvania courts to express broad and general aspirations of Pennsylvania's parole policy. See *Stewart v. Pennsylvania Bd. of Probation and Parole,* 714 A.2d 502, 508 (Pa.Commw.Ct.1998) ("Section 1 of the Parole Act, 61 P.S. §§ 331.1, ... enunciates the state's public policy concerning parole...."). The essential matter before us is not whether the statute on its face pertains to parole decisionmaking, but whether, in practice, the new language has altered the fundament for reviewing parole applications. See *Garner v. Jones,* 529 U.S. 244, 256 (2000). We look beyond the language of the statute and examine the Board's pronouncements of policy and its public statements that shed light on the interpretation of its statutory mandate. These suggest that after 1996 the Board gave foremost importance to the public safety factor. This is confirmed by the report in the September 20, 2000 *Harrisburg Patriot-News,* when then-Board chairman William Ward observed that legislative changes around 1995 recast the Board's mission to put public safety first.

The Board also asserts that its policy historically has placed equal emphasis on the interests of the inmate and the interests of public safety, and it points in its brief to us to statutory language in effect in the 1940s to prove this point: "whenever in its opinion [1] the best interests of the convict justify or require his being paroled and [2] it does not appear that the interest of the Commonwealth will be injured thereby," a prisoner will be granted parole.

Board Brief at 11-12. The Board correctly notes that the potential risk to public safety in granting parole has always been a consideration in the decisional process. It claims that other provisions of the parole statute have, under both the earlier and the current versions, required that the Board "consider the nature and circumstances of the offense committed, [and] the general character and background of the prisoner." 61 P.S. § 331.19.[13] However, to state that public safety was always a consideration does not mean that the Board gave it the same weight after 1996 in the decisional equation.

The record is convincing that after 1996, the Board applied to the public safety interest far greater weight. The evidence here demonstrates that since 1996, the Board has given special weight to the risk to public safety. Pre-1996, a prisoner could be denied parole because of public safety concerns only if those concerns

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[13]The provision provides in pertinent part:

> It shall be the duty of the board ... to consider the nature and circumstances of the offense committed, any recommendations made by the trial judge and prosecuting attorney, the general character and background of the prisoner, participation by a prisoner who is serving a sentence for a crime of violence as defined in 42 Pa.C.S. § 9714(g) (relating to sentences for second and subsequent offenses) in a victim impact education program offered by the Department of Corrections and ... the testimony of the victim or the victim's family.... The board shall further consider the notes of testimony of the sentencing hearing, if any, together with such additional information regarding the nature and circumstances of the offense committed for which sentence was imposed as may be available. The board shall further cause the conduct of the person while in prison and his physical, mental and behavior condition and history, his history of family violence and his complete criminal record ... to be reported and investigated.

together with other relevant factors outweighed, by a preponderance, the liberty interests of the inmate. The 1996 policy change placed first and foremost the public safety to the disadvantage of the remaining liberty interest of the prisoner.

The Pennsylvania courts have suggested that the 1996 public safety directive has caused the Board to review the petitions of violent offenders with redoubled scrutiny: "As a result [of statutory and policy changes in 1996], violent offenders are subjected to a more stringent standard of review for parole eligibility than nonviolent offenders. The purpose behind the classification and the disparate treatment between the violent and nonviolent offenders is the protection of public safety." *Myers v.. Ridge,* 712 A.2d 791, 799 (Pa.Commw.Ct.1998). Furthermore, the policy change around 1996 took place in the ambience of numerous policy statements that shed light on the Board's interpretation of its statutory mission: it clearly viewed its statutory mandate to require special emphasis on public safety.

Our attention is directed to the 50th Anniversary Report of the Board (1991), which states in its concluding paragraph that "protection of society" is the Board's "primary goal." App. 187. Read in context, however, this passage applies to the board's supervision of parolees. This same passage provided that "conditional release" permits the Board to meet its goal of protecting society. An earlier section of the document states that "[t]he immediate goal of parole supervision is the protection of society," by closely supervising the parolee and setting "conditions" for continued release, pertaining to work, health, education or other needs, that ensure smooth reintegration and, hence, the public safety. App. 185 (emphasis added). Upon analyzing this language, it is obvious that the Board meant in this report that "conditional release," with fixed conditions for continued

parole, is designed to safeguard the public after a parole has been granted. Thus, this 1991 anniversary report sheds no light on the post-1996 Board treatment of "public safety" as a factor before parole is granted.

The statistical evidence is quite staggering here, and strongly confirms the change in policy in 1996: of the 266 historical instances of commuted sentences on which the Board has kept records, all were granted parole on the first or second application. Many, if not most, of these original sentences were for violent crimes. Doubtless, these earlier Parole Boards spanned a wide spectrum of political and penological philosophies. Yet, the gubernatorial grant of commutation of sentence had such significance that the Board agreed to parole every commutee on his or her first or second application. The Thomas application is distinguished from these 266 cases only by the intervening policy directive of 1996, emphasizing public safety.

In addition to these statistics, substantive declarations of Board policy strongly support the proposition that, after 1996, the Board applied a new standard. A 1996 report by the Legislative Judiciary Committee strongly exhorted the Board to reform its parole policies by placing greater stress on public safety. A 1997 self-assessment by the Board specifically noted that during the 1995-1997 period, public safety became the Board's new "foremost concern." The new Guidelines, implemented between 1998 and 2000, placed more weight on "Victim Injury." The 2000 Board Decision denying Thomas's parole noted that its action was consistent with the Board's "mandate" to protect the public. This language did not appear on earlier Board decisions and reflects its new parole policy.

These declarations stand in bold contrast to the pre-1996 policies, which commanded that the Board give

weight to various factors in the parole process, such as Department of Corrections staff recommendations, educational accomplishments, job training, and therapy programs. This factor-based approach strongly suggests that dispositive weight should not be given to any one factor.[14] Pre-1996, release upon eligibility for parole was presumed, and any decision to deny parole based on public safety considerations had to be supported by specific reasons, which outweighed those factors favoring release. Prior to 1996, a Board recommendation contrary to the Guidelines required that the Board have "appropriate reasons for [its parole denial] decision." Because the pre-1996 Guidelines already factored in the risk to public safety vis-a-vis relevant recidivism indicators, the Board after 1996 could not give added, and certainly not exclusive, weight to public safety in overruling the Guidelines.

We conclude, then, that prior to 1996, the Board's concern for potential risks to public safety could not be the sole or dominant basis for parole denial under the existing Guidelines. Considerations of public safety were already incorporated into its Guidelines analysis; the Board had to point to "unique" factors as a basis for its rejection of the Guidelines. Moreover, the Board had to weigh all factors, militating for and against parole, and make its decision on the totality of the factors pertinent to parole, and give appropriate weight to the interests of the inmate. Heavy foot application on one factor could not have been the basis of granting or rejecting parole. Policy declarations in and after 1996 demonstrate that Board stance shifted and that, indeed, post-1996 considerations

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[14]The Guidelines themselves embody this philosophy. They are designed so that: "No single reason-for-refusal will justify the denial of parole: a preponderance of negative reasons will countervail release." App. 253.

of public safety became the dominant concern of the Board.

B. Application of New 1996 Policy to Thomas

The possession of a discretionary component in a parole policy does not per se exempt it from constitutional scrutiny. "The presence of discretion does not displace the protections of the Ex Post Facto clause." *Garner,* 529 U.S. at 253; cf. *Winsett v. McGinnes,* 617 F.2d 996, 1007 (3d Cir.1980) (en banc) (holding that prison officials' "discretion must be exercised consistently with the purpose and policy" governing early release program to satisfy due process). A Parole Board policy, although partly discretionary, is still subject to ex post facto analysis when there are sufficiently discernible criteria to suggest to a reviewing body that the new retroactive policies are being applied against the offender's interest.

In this case, as in our *Winsett* decision, a prison release authority is not permitted to circumvent its constitutional obligations merely because it has some discretion: "[I]t is by no means clear that the [relevant authorities] may, under the rules, invoke any criterion [they] choose[ ]." *Winsett,* 617 F.2d at 1006. Rather, the Board has, by both its past decisions to grant parole for commuted sentences, and by its formal declarations of policy, expounded discernible parameters that govern its discretion. See id. Here, the changes in parole policy can be shown to have been applied to Thomas's parole application, even though the Board possessed some discretion both before and after the 1996 policy change.

Although we are unable to express precisely what moved the Board to deny Thomas's petition, there is significant evidence that it acted upon policies that were established after Thomas's crime and conviction. Although discretion inheres within the Board's parole

authority, and new Board members may carry new ideas regarding the exercise of that discretion, and old Board members may change their mind in the light of new considerations, Thomas is nevertheless entitled to have the Board give genuine consideration and due regard to the factors prescribed by the Board's pre-1996 policies. We agree that the Board is entitled to learn from past experiences and mistakes. Board Brief at 17. This is so, just as a legislature might determine sentences for some crimes are too light and order judges to weigh certain factors more heavily in rendering a sentence. That a Board or legislature may learn from experience does not mean that those who were sentenced at an earlier juncture may now be more severely re-sentenced in the light of newly-found wisdom. This is precisely what the Ex Post Facto clause prohibits. Under the Board's reasoning, a determination, founded on newly discovered experience, could, by virtue of the Board's exalted discretion, forever deny a prisoner's preexisting right to parole consideration.

Although some discretion might still exist within the pre-1996 parameters, a parole decision that fails to address any of the criteria mandated by Board policy, such as institutional recommendations, willingness to undergo counseling and educational achievement, and instead utterly ignores all factors counseling in favor of release, falls outside of the realm of the legitimate exercise of discretion under the pre-1996 policies. Inference instructs us that the Board inappropriately relied on policies implemented in 1996, rather than the parole policies in place at the time of Thomas's crime and conviction.

In its briefs to this court, the Board purports to have reasons apart from public safety for its Thomas decisions. Those reasons appear to be asserted primarily as a post hoc defense to the allegations made in these proceedings.

The Board argues that Thomas's "instant assault offense" and "very high assaultive potential," both functions of the nature of the past crime, were not the primary bases on which the decision to deny parole was made. It claims that. upon reading Thomas's file, "it is easy to see why the Board found the [arguments against releasing Thomas] so persuasive." Board Reply Brief at 21. It asserts that numerous reasons were considered in support of its decision, including an unfavorable recommendation from the District Attorney, lack of sex offender therapy, and questionable psychological evaluations. However, these were not bona fide considerations in the decisions to deny parole. Our analysis shows that the primary basis for the parole denials was the risk of potential harm to public safety.

Under the Guidelines, Thomas was entitled to parole at his hearings in both 1997 and 1998. He is the only prisoner out of 266 commuted sentences who was not granted parole in his first or second application. The voting members of the Department of Corrections staff unanimously recommended Thomas for release at each application. The pre-1996 policies place significant weight on factors relating to an inmate's potential to adapt to life on the outside, and on the recommendations of the institutional staff. The pre-1996 policies suggest that no single factor should be controlling in a decision to deny parole to an applicant. Moreover, the pre-1996 Decision Making Guidelines were given significant, although not dispositive weight. A departure from the Guidelines required a recitation of unique factors, outweighing those in the Guidelines analysis. The Board Decisions on each of Thomas's parole hearings rely heavily on "high assaultive behavior potential," which relates primarily to the nature of the original offense, despite many other significant factors favoring parole.

Thus, reviewing the pre-1996 documents pertaining to parole, it becomes evident that, although the risk of potential danger to the public has always been a factor, it became the controlling feature of the Board's decision after 1996. The Board defaulted in its duty to consider factors other than the underlying offense and risk to public safety; it has failed to address any of the factors favoring release.

C. Board Decisions

In 1997, after the Department of Corrections denied Thomas pre-release, soon thereafter the Board denied Thomas parole on the very ground that he had not undergone a pre-release phase. The statutory pre-release requirement was adopted after Thomas's sentence was commuted. The Board later conceded in a state court suit initiated by Thomas that the law concerning the pre-release requirement should not have been applied to him. The Board's actions in this respect conveniently disregarded the Ex Post Facto clause to support its decision to deny parole.

We have carefully analyzed the Board's reports of disposition of Thomas's parole applications. The Board's 1997 and 1998 Decisions denied Thomas parole on the basis of several summary factors, including the severity of his underlying offense, his potential for future assaults, a prior assault offense, adverse recommendation from the District Attorney,[15] and Thomas's need for counseling and treatment. The Board also set forth suggestions, presumably to improve Thomas's next effort for parole, including participation in prescriptive programming, good prison conduct, sex

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[15]We discount the 1997 Board Decision's reliance on the District Attorney's recommendation because it does not reappear on any later Board Decisions.

offender therapy, and positive psychological evaluations. All of these appear to have been met prior to the 1997 and 1998 decisions: All voting officials from the Department of Corrections recommended parole in both 1997 and 1998; he had complied with all prescriptive programming; a 1993 psychological and a psychiatric evaluation, made in anticipation of his commutation hearing, recommended release. The 1998 Department of Corrections Vote Sheet showed "No Psychological Contraindications" to release; he had participated in sex offender therapy; he had job training; and he had a post-release support network in place. Rather than explain in what manner its recommendations had not been met, or what additional steps needed to be taken, or whether some insurmountable barrier existed to Thomas's parole, the Board essentially reiterated the same recommendations for improving Thomas's parole candidacy in each subsequent Decision.

Given its indifference to Thomas's efforts to improve his parole candidacy, and its repeated reliance on Thomas's "instant offense" and his potential for future "assaultive behavior," despite the Guidelines' finding that Thomas was not a recidivism risk, the Board appeared to rely exclusively on the nature of the underlying offense and the potential danger to the public if Thomas were released. However, the Board, in its briefs to this court, suggested it had other reasons than public safety, and submitted that Thomas had only participated in "denier" sex offender therapy, rather than "admitter" therapy; that is, he was engaged in a form of therapy for offenders who refused to admit their crimes. This concern did not appear in the formal Board Decisions and, therefore, must be disregarded.

The Board's own internal notes shed light on its deliberations in this regard. We recognize that the Board is not required to share its specific reasons for denying

parole. The Board's internal files in 1997 and 2000, however, merely noted, in a neutral way, that Thomas participated only in denier therapy and denied guilt for his crime without further comment or discussion of how this factor may have outweighed others favoring release. Significantly, the Board in 1997 and 1998 failed to mention lack of responsibility (or any other factor) in the section of the Guidelines worksheet where specific space is allotted to provide unique reasons for departing from a Guidelines recommendation. Instead, we have only the terse Board Decision and the Board's handwritten notes from which to glean its rationale for the parole denial.

In contrast to the scrawled notation of Thomas's lack of admitter therapy in its 1997 and 2000 worksheets, the Board underscores this point now in its briefs to us. Similarly, it discusses in its briefs how the benefits of the inmate sex offender therapy program are not fully realized, unless the inmate admits guilt for his or her crimes. However, the original, official deliberations showed that the Board failed to consider these matters at the times it reviewed Thomas's applications.

Moreover, the recommendation that Thomas receive sex offender therapy, which appeared on the 1997 report, did not appear on the 1998 Decision or worksheet. Then, inexplicably, the recommendation for sex offender therapy reappeared on Thomas's 2000 parole-refusal report. This casts still more doubt on the genuineness of the concern. It is also not clear that the Board's renewed concern over Thomas's "denier" therapy was ever properly communicated to Thomas, given that the reasons for denial in the Board Decision are vague and boilerplate. They nowhere mention the admitter-denier issue.

According to its briefs, the Board, in its 1998 and 2000 Decisions, may have relied on a 1996 psychological report that showed "evidence of possible sexual

preoccupation and psychosexual immaturity," as well as an "antisocial personality." Board Reply Brief at 26. However, there is no evidence that the report recommended against release, and the Board never weighed explicitly the report against the balance of all the other favorable recommendations for release by counselors and corrections staff. No reference was made to two 1993 pre-commutation reports by a psychologist and a psychiatrist, respectively, both strongly recommending commutation.

Furthermore, a 1999 psychological report, although acknowledging the negative factors cited in the 1996 report, never expressly recommended against release. On the contrary, the report made suggestions as to how to structure Thomas's parole once granted. App. 623. Meanwhile, a prison psychologist, on the 1998 Department of Corrections Vote Sheet, recommended release and noted that there were "no psychological contraindications" against release. The Board's own worksheet in 1998 merely noted that psychological evaluations showed Thomas to be an "average risk candidate."

In addition, many of the factors listed in the 1997 and 1998 Decisions were automatic designations. For example, "very high assaultive behavior potential" is assigned to a parole applicant whenever an applicant is convicted of a sexual offense. There is no indication whatever that the Board seriously contemplated the gravity of the public safety threat; nor is there any evidence that the Board followed its own procedures by pointing to factors independent of the Guidelines that counseled against granting parole.

In 2000, the Board again denied Thomas's parole, this time because "the mandates to protect the safety of the public and to assist in the fair administration of justice

cannot be achieved through your release on parole." Although, again, it suggested sex offender therapy, favorable recommendations from Department of Corrections officials, prescriptive programming and continued good conduct, the decisive element of the Board's decision protecting "the safety of the public."

In 1997 and 1998 the Guidelines protocol resulted in a conclusion that Thomas should be released, but he was not. In 2000, the protocol recommended against parole. The data entered into the chart for past substance abuse changed, and thus he was then classified as a habitual offender with history of past abuse. The record shows some alcohol abuse by Thomas, but no drug use. Moreover, this reclassification on the Guidelines worksheet increased his overall objective score and placed him in the range of cases where the Guidelines recommended against parole. There is no evidence that alcohol abuse should, suddenly, as of the 2000 report, be given such significance: The Guidelines recommendation in 2000 is not worthy of consideration because it appears to have been deliberately designed to achieve a non-parole decision.[16]

Most forcefully, the 2000 decision report highlighted the Board's new rationale for denying parole, a rationale which implicitly pervaded all of the Board Decisions on Thomas's application: it bluntly stated that Thomas's release interfered with its mission "to protect the safety of the public." Although public safety had been a part of the Board's pre-1996 criteria, it had never been an

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[16] Also, the Guidelines themselves changed, as of 2000, and victim injury was given a higher value (two points instead of one), militating more strongly against parole. This new valuation was reflected in Thomas's aggregate Guidelines-based score. This further evidences the advent of new policies and emphasis on public safety on the part of the Board.

exclusive, or even the most important, criterion. However, the Board does not attempt to offer any other explanation for its 2000 decision, while, in 1997 and 1998 it summarily recapitulated: "assaultive offense," potential for "assaultive behavior," and "victim injury" as reasons for its parole determinations. The reliance on these factors, and its failure to credibly consider any other factors, leads us to the ineluctable conclusion that the Board relied almost exclusively in 1997, 1998 and 2000 on the nature of the past offense and the potential danger to public safety.

The Board protests that the "assaultive potential" designation does not "require an automatic parole refusal." On the record before us, however, we do not agree. The Guidelines did not show him to be a recidivism risk. The Board did not consider seriously psychological contraindications or any other non-Guidelines factor that might have militated against parole. The Board's denial of Thomas's parole, despite its claims that the decision was the result of the discretion vested in it by the pre-1996 policies, exceeded any reasonable interpretation of the applicable policies. It appears that the Board was applying the new policy. Now, belatedly, in its briefs, the Board seeks to eviscerate the grounds for its decisions with a gloss of compliance with the pre-1996 policies. This will not do.

D. Implications of *Winklespecht*

Since oral argument in this matter, the Board has called to our attention the recent Pennsylvania Supreme Court decision, *Winklespecht v. Pennsylvania Board of Probation and Parole*, 813 A.2d 688, 2002 WL 31898105 (Pa.2002). The Board cites this case in support of the proposition that § 331.1's concern with "protect[ing] the safety of the public," added "nothing new to the parole process and [has] always been [an] underlying concern[]."

Id. The Pennsylvania Supreme Court held that § 331.1 does not change Pennsylvania policy as to the criteria for parole "[n]or did the addition of this (new) language create a new offense or increase the penalty for an existing offense." Focusing on the added language to § 331.1 concerning "protect[ing] the safety of the public" and "assist[ing] in the fair administration of justice," the court concluded that these concepts have always been underlying concerns.

This decision, made after the Board's actions on Thomas's parole, came too late to alter the Board's view of the statutory amendment on the outcome of this case. Not having the benefit of the Supreme Court decision, the evidence before us shows that the Board interpreted § 331.1 to mandate foremost the consideration of public safety. The Board mistakenly construed the 1996 statutory change to signify a substantive change in its parole function. See *Gall v. Parker,* 231 F.3d 265, 304 (6th Cir.2000). As we noted previously, a public statement of the Board chairman and Board policy declaration confirm this substantive change in Board policy. The Pennsylvania Commonwealth Court too understood the 1996 amendment to enact a substantive change in Board policy. See *Stewart,* 714 A.2d at 508; *Myers,* 712 A.2d at 799. The Board's actions and policy pronouncements demonstrate a marked added weight on public safety concerns, uninfluenced by the subsequent Court interpretation of the statute.

E. Adverse Impact of Retrospective Policy on Thomas

As to the second Ex Post Facto criterion, that the change must adversely affect the offender, the Board argues that Thomas, having been sentenced to life, "had no legitimate expectation of ever being paroled." Board Brief at 10-11. It notes that, during the 1970s, only 10% of life sentences were commuted and paroled. That figure

diminished to less than half a percent in the 1990s. The Governor's power to grant commutation was in his absolute discretion, and thus, according to the Board, Thomas's eligibility for parole was entirely speculative. The Board does not dispute that the possibility of parole at sentencing based on some explicit criteria gave rise to a liberty interest. Hence, the procedures for reviewing parole applications must be constitutionally sound.

Garner held that the Ex Post Facto clause prohibited the application of post-conviction laws to prisoners that would result in a significant increase in the chances of prolonged incarceration. 529 U.S. at 251. Prisoners are entitled to know the range of punishments available at the time of sentencing, and during the adjudication of their case, so that they can plea bargain and strategize effectively: The Ex Post Facto clause "(1) ... prevents legislatures from interfering with the executive and judicial roles of prosecution and punishment; and (2) it assures that legislative acts give fair warning of what actions will be punished and the degree to which they will be punished." *Coady*, 251 F.3d at 487-88. Therefore, an offender, prior to his conviction and sentencing, is entitled to know not only his maximum possible punishment, but also his or her chances of receiving early release, since this too is a relevant factor in the plea bargaining calculus. An adverse change in one's prospects for release disadvantages a prisoner just as surely as an upward change in the minimum duration of sentence.

The possibility of commutation existed at the time of Thomas's conviction and sentence. The relevant criterion for determining the applicability of ex post facto analysis is the effect of new policies on "*eligibility* for reduced imprisonment," rather than any fixed guarantee of release. *Lynce v. Mathis*, 519 U.S. 433, 445 (1997) (emphasis added). Therefore, a sentence that contained

the right to parole consideration would give rise to a constitutional expectation that the parole guidelines extant at the time of the crime would be applied. See *Garner,* 529 U.S. at 250. Eligibility for a commutation of a life sentence entails the possibility of parole, albeit a more distant possibility than for sentences that carry the possibility of parole ab initio. It also gives rise to the expectation that the parole criteria in effect at the time of the crime will be applied.

The Board contends that there was never a "significant" possibility, given the unlikelihood of commutation, that Thomas would ever be paroled. *Garner,* 529 U.S. at 256. Indeed, as the Board contends, in most cases of life sentences in Pennsylvania, parole will never be an option as commutations are quite rare. However, as unlikely as these initial prospects for parole might have been, the application of the new parole policies in Thomas's case rendered them even more remote. The new policy "substantially increased the period of incarceration;" it reduced the possibilities of ever obtaining release.

The Board's reliance on *California Dept. of Corrections v. Morales,* 514 U.S. 499, 508-09 (1995) is misplaced. Although the parole policy change in Morales wrought a small change in the average duration of a prison sentence, the change was held to be too minuscule to rise to a constitutional violation. Morales considered the effect of a procedural change in parole law, which provided for a greater wait-period between first and second hearings. *Id.* at 507. Here the substantive criteria for parole release have changed.

Lynce v. Mathis set forth a key distinction between the Morales case and this petition. In *Lynce,* a law in effect at the time of conviction provided that if a prison population reached approximately 98% of its capacity, good conduct

credits needed for early release could be acquired at an accelerated pace. The law was changed during the prisoner's sentence, and his accelerated credits, earned during a time of over-98% prison capacity, were cancelled and parole denied. 519 U.S. at 438-39.

The *Lynce* prison officials argued that, at the time of conviction, it was entirely speculative whether the prison would become overcrowded during the petitioner's incarceration, and thus he was excluded from ex post facto protection under the holding in *Morales*. However, *Lynce* distinguished *Morales*, because there was no evidence in *Morales* that the change affected the petitioner's own sentence detrimentally. *Lynce*, 519 U.S. at 447. In *Lynce*, the population did exceed 98% during petitioner's incarceration, and by his own conduct the prisoner achieved enough credits for good behavior, so that he became eligible for release under the old rules. The change in policy had the effect of increasing the punishment in his individual case and thus violated ex post facto. *Id.*

Thus, under *Lynce's* reasoning, the parole change substantially impacted Thomas in violation of the Ex Post Facto clause. Moreover, Thomas is entitled to the benefits of his good behavior in prison; the opportunity to reduce his sentence through commutation, no matter how speculative, existed at the time of Thomas's crime. Thomas successfully attained a commutation of his sentence; he was entitled to corresponding reduction in sentence. We, therefore, hold that to retroactively apply changes in the parole laws made after conviction for a life sentence in Pennsylvania that adversely affect the release of prisoners whose sentences have been commuted, violates the Ex Post Facto clause.

III. Thomas's Due Process Claim

Thomas argues that the Board's handling of his application without any real consideration of its merits, in violation of the Board's own procedures, offends due process, and that this court should itself order him released. Although the Board has not given due consideration to the relevant factors, this can be explained by its misguided reliance on the post-1996 criteria. Moreover, we are exceedingly reluctant to usurp the Board's functions and, except in our review capacity, substitute our own judgment for that of the parole Board. Although there were flaws and oversights in the Board's consideration of Thomas's applications, we are not entirely convinced that the Board is unable to give Thomas a fair hearing in light of the important considerations we have set forth in this opinion.

IV. Conclusion

Ordinarily, the Board's decision to parole or deny parole to a prisoner is based on the consideration of many factors, with no one factor being dispositive. We expect that, on remand, the Board will not be defensive, but instead will fairly consider Thomas's application in the light of our observations and Ex Post Facto prohibitions. If the Guidelines recommend release, the Board should fairly consider the weight of this recommendation. A decision contrary to a Guidelines recommendation must be buttressed by unique factors which outweigh the Guidelines endorsement. Moreover, release on parole is a Board policy presumption, and parole should be granted unless countervailing negative factors affirmatively outweigh reasons supporting release.

In conclusion, the Order of the District Court is hereby affirmed, with directions to remand the matter to the Board for further proceedings consistent with this opinion, including a new hearing for Thomas and the

Board's written decision thereon within 45 days after the mandate of this court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOUIS MICKENS-THOMAS, Plaintiff	:	CIVIL ACTION
	:	No. 99-6161
v.	:	
DONALD VAUGHN, et al., Defendants	:	

MEMORANDUM

BUCKWALTER, J. March 15, 2002

I. STATEMENT OF THE CASE

On September 29, 1964, the body of twelve-year old Edith Connor was found in a narrow alley behind petitioner's shoe repair shop on 40th Street in Philadelphia. The properties along 40th Street had rear wooden fences with a door leading from the back yard into the three-foot wide alley. In the opinion of the Pennsylvania Supreme Court (*Commonwealth v. Thomas*, 448 Pa. 42, 292 A.2d 352 (1972)), the following narrative appeared:

> The police arrived, pronounced the girl dead at the scene and removed the body to the morgue. The body was then examined by one Dr. Edward Campbell, Medical Examiner and Forensic pathologist. The deceased's blouse had been torn and the zipper of her dungarees (men's style) was partially ripped off. The dungarees were also torn at the inner seams of the

thighs on both sides of the crotch. The crotch seam of the deceased's panties was likewise torn. The cause of death was attributed to strangulation by ligature. There were also bruises to the skin of the neck, a broken bone on the right side of the neck and bruises of the voice box. Tears were found in the child's rectum and testing ascertained the presence of acid phosphates in the vagina.

The clothing of the deceased was delivered to the Police Department Laboratory where brushings and microscopic examination disclosed particles of leather, leather dust, glue, polish, dog hairs, fiber and chips of paint adhering to the clothing. These findings led to the issuance of three search warrants for the person of and premises occupied by the appellant, which premises were located at 1109 North 40th Street and consisted of a shoe repair shop in the ground floor and living quarters in the rear of the shop. The execution of these warrants resulted in obtaining, *inter alia*, paint scrapings from various parts of the premises, specimens of leather, glue, fibers, threads and hairs, clothing of appellant, bed sheets, bedspreads and drapes. These specimens were delivered to the Police Department Laboratory, analyzed by Dr. Edward J. Burke, then the Laboratory Director, and compared with items removed from the deceased's clothing. The Commonwealth's entire case rested upon the testimony of Dr. Burke with reference to the similarity of the specimens.

Petitioner was convicted by a jury of first-degree murder of Edith Connor. He was sentenced to life imprisonment by Judge Joseph L. McGlynn, Jr. on April 23, 1971. The sentence was affirmed by the Supreme Court of Pennsylvania, *supra*.

His subsequent *pro se* petition for post conviction relief on a single technical ground that the indictment did not use the words "kill and murder" was denied. *Commonwealth v. Thomas*, Pa.Super. 408 A.2d 1148 (1979).

In 1973, a federal petition for habeas corpus was dismissed without prejudice for failure to exhaust state remedies (E.D. Pa. C.A. No. 73-2711).

In 1993, petitioner filed an application with the Pennsylvania Board of Pardons.[1] The four members of the

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[1]Article 4, § 9 of the Pennsylvania Constitution provides:

(a) In all criminal cases except impeachment, the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, after full hearing in open session, upon due public notice. The recommendation, with the reasons therefor at length, shall be delivered to the Governor and a copy thereof shall be kept on file in the office of the Lieutenant Governor in a docket kept for that purpose.

(b) The Board of Pardons shall consist of the Lieutenant Governor who shall be chairman, the Attorney General and three members appointed by the Governor with the consent of two-thirds or a majority of the members elected to the Senate as is specified by law for terms of six years. The three members appointed by the Governor shall be residents of Pennsylvania and shall be recognized leaders in their fields; one shall be a member of the bar; one a penologist, and the third a doctor of medicine, psychiatrist or psychologist. The board shall keep records of its actions, which shall at all times be open for public inspection.

Amended May 16, 1967; May 20, 1975.

Board of Pardons, Attorney General Ernest Preate, Jr., Dr. Daniel J. Menniti, Warden Thomas Frame, and Ronald J. Harper, Esq., who heard the case (then Lieutenant Governor Mark Singel did not hear the oral presentation), recommended unanimously that the life sentence of petitioner, which was computed from October 15, 1964, the day after petitioner's arrest, be commuted from life imprisonment to a term of imprisonment of thirty-one (31) years, nine (9) months, six (6) days to life expiring on July 21, 1996, and if he be released on parole in accordance with law he shall remain on parole the balance of his life unless returned to prison for violation of his parole.

The Board of Pardons added the following:

Mr. Thomas has served over twenty-nine years of his sentence. He has had only five misconducts since 1971. He has continued to maintain his innocence throughout his incarceration. He earned a Bachelor of Arts Degree from Villanova in 1992. He completed sex therapy and continues involvement with Alcoholics Anonymous. Since 1987, he has worked in the Weave Shop and has displayed excellent work habits. The Staff, Superintendent and Commissioner all support commutation due to the applicant's maturity and stability.

The members of the Board of Pardons were impressed by the strong community support for this application. Over two dozen individuals attended the clemency hearing on behalf of Mr. Thomas. We are confident that he will have the necessary support to guide him from the structured environment of prison to productive living in society. We suggest a two year post-dated minimum sentence date of July 21, 1996. This will enable him the opportunity to take full advantage of pre-release programs offered by the

Department of Corrections. At the expiration of his minimum sentence, he will have served nearly 32 years incarcerated.

On January 14, 1995, Governor Robert Casey granted commutation as follows:

> Therefore, Know Ye, That in consideration of the promises and by virtue of the authority vested in me by the Constitution, I have commuted the sentence of life imprisonment of the said Louis C. Mickens-Thomas from life imprisonment to the minimum term of 31 years, 9 months, 6 days to life expiring on July 21, 1996, so that if he be released on parole in accordance with law he shall remain on parole the balance of his natural life unless returned to the correctional institution for violation of parole and that the sentence of imprisonment is hereby commuted accordingly so that he may be eligible for pre-release consideration at the discretion of the Dept. of Corrections. Subsequent to the date of my signature below a conviction of a new summary, misdemeanor or felony offense may upon a hearing by the Board of Pardons render my granting of this clemency null and void.

As set forth above, petitioner did not become eligible for parole until July 21, 1996. In July of 1995, after his commutation but before the expiration of his prison term, an act duly passed by the legislators and applicable to the Pennsylvania Board of Probation and Parole (hereafter the Board) provided in part as follows:

> In no case shall the board act upon an application of an inmate whose term of imprisonment was commuted from life to life on parole or upon an inmate who was serving a term of imprisonment for a crime of violence or is an inmate serving a sentence

under 42 Pa.C.S. § 9712 (relating to sentences for offenses committed with firearms) unless the inmate has served at least one year in a pre-release center.

61 P.S. § 331.34a.

The Department of Corrections did not approve petitioner for pre-release (Letter of June 6, 1995 - P-21). On July 22, 1996, petitioner filed an application for release but the Parole Board notified him that it could not act upon his application since he had not completed one year in pre-release, citing 61 P.S. § 331.34a (*See* Respondent Exhibit 9 at 217, Letter to Leonard Sosnov, Esquire dated September 25, 1996).

On November 26, 1996, petitioner filed a petition for review in the nature of an action in mandamus invoking the original jurisdiction of the Commonwealth Court of Pennsylvania. *See Mickens-Thomas v. Com.*, — Pa.Cmwlth. —, 699 A.2d 792 (1997). In that case, the Pennsylvania Board of Probation and Parole conceded that 61 P.S. § 331.34a could not be applied retroactively to petitioner. While petitioner was seeking an order compelling the Board to parole him, the Commonwealth Court denied that relief. Instead, it directed the Board by order dated 8/12/97 to "consider and rule on Petitioner's application for parole within ten days of the entry of this order and, in the event of denial of the application, transmit a written statement of the reasons for the denial to the Pennsylvania Board of Pardons for its consideration of whether to accept the denial or immediately release petitioner on parole." Petitioner's November 12, 1997 notice of appeal from this judgment was quashed by the Pennsylvania Supreme Court on 1/15/98.

Pursuant to the directive of the Commonwealth Court, the Board considered petitioner's application for parole

on August 21, 1997 and denied it. The Board asked for an evaluation by mental health staff experienced in dealing with sex offenders and scheduled another review for March of 1998. Also pursuant to the Commonwealth Court's order, the Board transmitted a written statement of its reason as follows: "Assaultive instant offense. Very high assaultive behavior potential. Victim injury. Unfavorable recommendation from the District Attorney. Conviction of prior assault offense." With regard to the latter, stipulation number 2, *see infra*, reads: "In 1945, Mr. Thomas was charged with rape when he was 17 years old. The rape charge was dismissed and a wayward minor charge was substituted. A wayward minor charge is not an adult conviction but a juvenile adjudication, for which Mr. Thomas was placed on probation."

On September 18, 1997, the Pardon Board by a vote of 3-2 concurred in the Board's action denying parole. The Pardon Board at this time was composed of Lieutenant Governor Mark Schweiker, Attorney General Michael Fisher, Warden Richard Gigliotti, Dr. Daniel Menniti and Thomas Harper, Esquire (*See* Stipulations, No. 4).

On October 29, 1997, petitioner filed an application for leave to file original process with the Pennsylvania Supreme Court, along with a petition for writ of habeas corpus seeking his immediate release from prison. In a *per curiam* order entered January 28, 1998, the court allowed petitioner to file original process and summarily denied the habeas petition. *See Mickens-Thomas v. Vaughn*, No. 158 E.D. Misc. Docket 1997.

On March 30, 1998, the Board again denied petitioner's request for parole. The reasons given were: "Assaultive instant offense. Very high assaultive behavior potential. Victim injury. Your need for counseling and treatment." (Respondent's Exhibit 9 at 28). This action

was taken even though petitioner was in full compliance with the Board's stipulations from the August 1997 hearing and had "full staff support" of the Department of Corrections.

A Review Summarization Report showed that petitioner had complied with the Board's stipulation under the August 21, 1997 order. Petitioner remained free of misconducts, was recommended for release by the Department of Corrections and was in full compliance with the treatment programs. (*See* P-5 (c)(e)).

Once again the Board scheduled another review for during or after March 2000. It forwarded the reasons for its decision to the Pardons Board which on April 21, 1998 concurred with the decision of the Board. (Respondent's Exhibit 10 at 232).

Petitioner filed the petition now before the court on December 6, 1999. While this litigation was pending, the Board, on March 9, 2000, once again denied parole and scheduled review for March of 2002. The following written stipulation has been entered into by the parties:

Stipulations

Both parties reserve the right to argue that the following information is irrelevant and should not be considered by the Court. Should the Court ultimately decide that the information is relevant and admissible, the parties stipulate that the following facts are true:

1. Mr. Thomas has not had any misconducts since 1990 but has incurred all of the misconducts listed on Exhibit R-1.

2. In 1945, Mr. Thomas was charged with rape when he was 17 years old. The rape charge was dismissed and a wayward minor charge substituted. A wayward minor charge is not an adult conviction but is a juvenile adjudication, for which Mr. Thomas was placed on probation.

3. Records have been located for 287 inmates whose life sentences were commuted between 1942 and the present. More than 287 life sentences were commuted during that time period, but their records could not be located by either the Board of Pardons or the Board of Probation and Parole. In each case of these 287 cases, the Governor commuted the inmate's minimum sentence from life in prison to a specified term of years, establishing a specific date on which that inmate would be eligible for parole. The records also indicate when 266 of those 287 cases were granted parole - 259 were granted parole on their first application; seven were denied parole on their first application but subsequently granted parole. For those seven inmates, the parties stipulate to the information attached as Exhibits R2 through R8. Of the 266 inmates whose release dates are known, 228 were paroled between 1971 and 1995.

4. From January 1, 1997 until today, 63 life prisoners filed a total of 73 commutation applications with the Board of Pardons. The Board voted not to hold a public hearing on 69 of those applications; the Board granted a hearing on the remaining four applications. Three of those public hearings have already been held, and the Board ultimately voted not to recommend commutation. The fourth public hearing has yet to be scheduled.

When the Board of Pardons concurred in the Parole Board's decisions not to release Mr. Thomas in

September 1997 and March 1998, the Board of Pardons was comprised of Lt. Governor Mark Schweiker, Attorney General Michael Fisher, Dr. Daniel Menniti, Warden Richard Gigliotti, and Thomas Harper, Esquire. On both occasions, Schweiker, Fisher and Gigliotti voted to concur with the Parole Board's decision, whereas Mr. Harper and Dr. Menniti voted against concurrence.

During their tenure on the Board of Pardons, Lt. Governor Schweiker and Warden Gigliotti never voted in favor of recommending commutation of a life sentence. As of today, Attorney General Fisher has not yet voted in favor of recommending commutation of a life sentence; however, he voted in favor of holding a public hearing on three commutation cases, one of which has not yet been heard by the Board. Likewise, during his tenure, Warden Gigliotti did not vote in favor of recommending commutation of a life sentence. However, Warden Gigliotti did vote in favor of a public hearing in one commutation case.

5. The parties waive all objections, except for relevance to the admission of the documents listed on the attached list prepared by the plaintiff. (Exhibits 1-25).

6. Each time the Board of Probation and Parole refused to parole Mr. Thomas, the decision makers all had access to the Parole Board's entire file, docketed as 5308-H. Any document that was reviewed or considered by the Board is contained in that file. The parties waive all objections, except for relevance, to the admission of a complete copy of that file as redacted during discovery to replace identifying information with a generic description of the provider of the information (e.g. counselor, victim, etc.) (Exhibit R9).

7. Each time the Board of Pardons concurred in the Board of Probation and Parole's refusal to grant parole, every member of the Board of Pardons had access to the Board's entire file, docketed as B-427 Session July 1994. Any document that was reviewed or considered by the Board is contained in that file. The parties waive all objections, except for relevance, to the admission of that file as provided in discovery. (Exhibit R10).

8. The parties waive all objections, except for relevance, to the admission of an affidavit, dated December 12, 2001, by Nelson R. Zullinger, and its attachments. (Exhibit R11, Exhibit 11A and Exhibit 11B).

9. The parties waive all objections, except for relevance, to the admission of respondents' chart entitled "Life Prisoners Released by Commutation Compared with the Total Population of Life Prisoners (1971 through 2001)." (Exhibit R12).

10. The parties waive all objections, except for relevance to admission of documentation explaining the sexual offender treatment provided by the Joseph J. Peters Institute at the State Correctional Institute at Graterford. (Exhibit R13).

II. STANDARD OF REVIEW

Initially, the court agrees with the petitioner's argument with regard to exhaustion of remedies as stated in its opinion of September 29, 2000. Accordingly its review of the constitutional claims is *de novo.*

Petitioner argues that the retroactive application of changes in rules, guidelines, policies or statutes

governing a discretionary parole scheme may violate the *ex post facto* clause. As parole in Pennsylvania is governed by statutes, regulations and internal memoranda and guidelines, it follows that *ex post facto* principles are fully applicable. *Citing Coady v. Vaughn*, 251 F.3d 480 (3d Cir. 2001), petitioner argues that as stated therein:

> [T]wo critical elements must be present before a court may find that criminal or penal law violates the *ex post facto* clause: (1) the law must be retrospective, applying to events occurring before its enactment; and (2) it must disadvantage the offender affected by it. *Id.*

Thus, petitioner argues, since the Board has retrospectively applied statutory, rule and policy changes to him, the dispositive question is whether he has been disadvantaged by the application of changes in law.

Although the above summary is somewhat oversimplified, petitioner's statement of the law is substantially correct. As an initial matter, then, the court must determine what, if any, statutory law, rule and/or policy changes have retrospectively been applied to petitioner.

The Pennsylvania Probation and Parole Act of 1941 established the following policy:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject or sentenced to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and

> efficient parole administration and to the end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth. 1941, Aug. 6, P.L. 861, Section 1.

Petitioner then cites several Pennsylvania appellate court cases standing for or at least supporting the petitioner's contention that release on parole and rehabilitation under the Pennsylvania Probation and Parole Act was viewed as consistent with the statutory goal of protection of society. Indeed, the petitioner points to the following conclusion appearing in the 1991 50th Annual Report of the Board:

> The Board and its staff recognize that ex-offenders can change if given the proper opportunities with dignity and respect. Conditional release on parole provides the offender with the opportunity for change which simultaneously enables the Board to meet its primary goal of the protection of society. It is through these efforts, and the willingness of the client to use these opportunities in a constructive way, that the real mission of the agency is accomplished. P-12.

The sentencing system in Pennsylvania permits the trial judge to determine when a defendant may be released from prison by the imposition of a minimum and maximum sentence. A defendant may apply for parole at the expiration of his minimum sentence. Petitioner references a 1989 Manual of Operating Procedure in which the Board states at 2.2 thereof: "The Board's intentions are not to circumvent the authority of the sentencing court and feel that an individual should be given every consideration for parole at the expiration of the minimum sentence."

In the 1991 50th Annual Report previously referred to, it was reported that about 80% of inmates are granted

parole at the initial review. (Petitioner Exhibit 12 at 6). By the first quarter of 1996, the release date on prisoner's minimum date dropped from 80% to 29%. *See Commonwealth v. Stark*, 698 A.2d 1327, 1332 (Pa.Super. 1997).

Significantly, an amendment to the Probation and Parole Act in December of 1996 amended the public policy as to parole which now reads as follows:

> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison.
>
> *In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public.* In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

Reflecting this amendment, the Board in its 1995-1997 report stated in its Mission Statement:

> *The Pennsylvania Board of Probation and Parole is committed to protecting the safety of the public,* addressing the needs of crime victims; improving county adult probation and parole services, and assisting in the fair administration of justice by ensuring the custody, control and treatment of offenders under the jurisdiction of the Board.

It seems clear that the Board has adopted the policy change made in the 1996 amendment. In this regard, a

recent case from the Commonwealth Court of Pennsylvania contained the following:

> To further support its argument, the Board offered that even though Voss has not been paroled, the current public policy requires the Board to seek first and foremost to protect the safety of the public. While acknowledging that the public policy as to parole changed in 1996 from a client-centered policy emphasizing rehabilitation to one that emphasizes public safety, deterrence of crime and the incapacitation of criminals, the Board argues that the Section 19 standards by which an offender is reviewed have not changed and that it employed those standards in denying Voss' parole application.

Voss v. Pennsylvania Board of Probation and Parole, 2001 WL 1584398 (Pa.Cmwlth. Dec. 12, 2001).

The statistical data from the state's records presented by petitioner tends to show that violent offenders now may face a significant likelihood of serving more time in prison and thus have been disadvantaged by the change in the law in 1996.[2]

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[2]The court has reviewed the exhibits which support the following statement in petitioner's brief:

> Under the amended statute, the Parole Board has treated violent offenders far more restrictively and has routinely held these inmates past their minimum parole eligibility dates. In 1997, 59% of the applications for parole of non-violent offenders were granted, but only 31% of violent offenders received parole. *See* P-8 at 0002538. During the week of March 19, 1998 (when petitioner was considered for parole) only 24% of violent offender parole applications were granted, while 62% of non-violent offenders received parole. *See* P-7 at 0002466. (For the entire year, 1998, 56%

(continued...)

In the *Voss* case cited above, the Board argued that the Section 19 standards by which an offender is reviewed have not changed from the 1941 Act (which is substantially correct although some changes not pertinent to this argument were made). *See* 61 P.S. 331.21(a).

However, under the jurisprudence of this circuit (*see Coady, supra*) and the Supreme Court (*Garner v. Jones*, 529 U.S. 244, 120 S.Ct. 1362 (2000)), if petitioner demonstrates by evidence drawn from the state's record that a rule's practical application, retrospectively, by the agency charged with exercising discretion will result in a longer period of incarceration than under the earlier rule, the *ex post* clause is violated.

The state correctly points out that petitioner's claim has to be more than mere speculation. That is to say, there must be clear knowledge that the retroactive application of the rule increases, to a significant degree, the likelihood or probability of prolonging petitioner's incarceration.

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[2](...continued)
of non-violent offender parole applications were granted, while only 31% of violent offenders were paroled. P-9 at 0001647). Prior to these changes in law and policy with respect to violent offenders, upwards 80% of all offenders were granted parole. *See supra*, at 11. *See also Commonwealth v. Stark*, 698 A.2d 1327, 1332 (Pa. Super. 1997) ("the release date on prisoner's minimum date dropped from 80% in the years from 1992-1993 to 29% in the first quarter of 1996). Where a minimum sentence is viewed as too lenient, it is now considered a negative factor for parole. *See* P-24(a), "Truth-In-Sentencing Eligibility," at 9 (unnumbered).

The statistical evidence of offenders charged with crimes of violence who are now less likely to get paroled may not be sufficiently complete as the state argues to prove that the retroactive application of any new law, rule or guideline of the Board has increased to a significant degree the likelihood of prolonging a prisoner's incarceration.

But those statistics cited by petitioner coupled with the stipulations 3 and 4 in this case and the history of petitioner's unsuccessful application in March of 1998, despite having seemingly complied with all prerequisites for parole, demonstrate that the agencies responsible for exercising discretion have retroactively applied the 1996 policy provision to petitioner, and this has increased to a significant degree the likelihood that petitioner will be in jail longer than if the pre-1996 policy would have been followed. It does not follow that petitioner should now be released. I agree with the state that what petitioner is entitled to have is that the Parole Board consider his application under the pre-1996 law.

Petitioner has also raised the argument that he was denied due process rights.

First, petitioner states that since he had a reasonable and objective expectation of release on parole, he had a liberty interest in parole which was violated by the parole refusal of March 19, 1998. However, this is not the case in Pennsylvania where parole is merely a possibility, an act which lies solely in the discretion of the Board. Like the case which petitioner cites in support of his argument, *Greenholtz v. Nebraska Penal Inmates*, 422 U.S. 1 (1979), the language and structure of Pennsylvania's Probation and Parole Act provides a mechanism for parole that is entitled to some constitutional protection. Petitioner has not pointed out

how that mechanism is constitutionally defective other than his parole was refused. That clearly is not sufficient.

Petitioner makes a more thorough and detailed argument that he was denied substantive due process in that the refusal to parole him was arbitrary, capricious and fundamentally unfair. The thrust of petitioner's argument can be summarized from his brief at page 26:

> Pennsylvania law required the Parole Board to grant parole unless it had concluded that petitioner was not rehabilitated and suitable for release into society. As we have demonstrated, the Pennsylvania statutory scheme did not permit a denial of parole based solely on the nature of the crime or the defendant's pre-offense behavior. Thus, as in *Greenholtz*, 442 U.S. at 10, the Pennsylvania statutory scheme involves a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he had done." The Parole Board has "the fact-finding duty of determining in each case when the conditions prescribed by the legislature for provisional release from confinement have been complied with . . ." *Commonwealth ex rel. Banks v. Cain*, 28 A.2d 897, 901 (Pa. 1942).
>
> In this case, the statutory mandate was completely ignored by the Parole Board. The Board's publicly stated reasons may appear rational, but, as we have demonstrated, the reasons were boilerplate, based solely on the offense committed over 33 years earlier.

The petitioner's contention is flawed, however.

Stipulation 6 provides that each time the Board refused parole to petitioner, the decision maker had access to the Board's entire file and that any document

reviewed or considered by the Board is contained in that file marked as Exhibit R9.

I have reviewed that entire file and it does not support petitioner's argument that his denial of March 1998 (which is what he is contending) was based solely on the offense committed over 33 years earlier. Other factors as pointed out by respondent in its brief could have been considered by the Board to support its stated reason of "very high assaultive behavior potential." For example, the report found at P-5(f) states:

> PSYCHOLOGICAL REPORT: A 3-8-96 psychology evaluation describes an antisocial personality of superior intellect with a history of alcoholism. Testing indicates evidence of possible sexual preoccupation and psychosexual immaturity. Stability score is 2.

This court cannot substitute its judgment for the Board's even where as here the Board's decision is arguably contrary to the weight of the evidence in favor of parole. It's decision is not without any rational support in the record and thus petitioner's claim of denial of substantive due process falls short.

Having found an *ex post facto* violation, petitioner is entitled to relief. Both sides agree that a remand for a further hearing before the Parole Board under appropriate standards is the normal relief. Petitioner argues that where the Board intentionally evaded a court mandate or acted in bad faith, the court may order immediate release. Here, the Board has neither intentionally evaded a court mandate nor acted in bad faith.

An order follows.

ORDER

AND NOW, this 15th day of March, 2002, the petitioner's writ of habeas corpus is GRANTED to the extent that the case is REMANDED for a further hearing before the Pennsylvania Board of Probation and Parole to be held within thirty (30) days under the standards that existed prior to the enactment of the amendment to the Probation and Parole Act codified at 61 P.S. § 331.1.

BY THE COURT:

RONALD L. BUCKWALTER, J.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-2047 & 02-2213

LOUIS MICKENS-THOMAS
Appellant in No. 02-2213

v.

DONALD VAUGHN, SUPERINTENDENT;
PENNSYLVANIA BOARD OF PROBATION AND PAROLE;
THE PENNSYLVANIA BOARD OF PARDONS; THE
ATTORNEY GENERAL OF THE STATE OF
PENNSYLVANIA

Pennsylvania Board of Probation and Parole
Appellant in No. 02-2047

Appeal from the United States District Court for the
Eastern District of Pennsylvania
D.C. No.: 99-cv-06161
District Judge: Honorable Ronald L. Buckwalter

Present: BECKER, *Chief Judge*, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH and ROSENN,* *Circuit Judges*.

(Filed Mar 24 2003)

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*Honorable Max Rosenn, Senior Circuit Judge, was a member of the original panel and voted as to panel rehearing only.

SUR PETITION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant/Appellee Pennsylvania Board of Probation and Parole having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Max Rosenn
Circuit Judge

Dated: 03/24/03

[Exhibit P-13]

COMMONWEALTH OF PENNSYLVANIA
BOARD OF PROBATION AND PAROLE
Fiscal Years 1993-95 Biennial Report

* * * * *

TABLE 3
TOTAL INMATES CONSIDERED FOR PAROLE OVER FIVE FISCAL YEARS

Fiscal Year	Parole Considerations	Paroles Granted	Percent Granted
1990-91	8,954	6,890	77%
1991-92	8,949	6,912	77%
1992-93	9,932	7,652	77%
1993-94	10,613	7,678	72%
1994-95	9,645	6,129	64%

[Exhibit P-14]

COMMONWEALTH OF PENNSYLVANIA
BOARD OF PROBATION AND PAROLE
Fiscal Years 1995-97 Biennial Report

* * * * *

TABLE 3
TOTAL INMATES CONSIDERED FOR PAROLE OVER FIVE FISCAL YEARS

Fiscal Year	Parole Considerations	Paroles Granted	Percent Granted

1992-93	9,932	7,652	77%
1993-94	10,613	7,678	72%
1994-95	9,645	6,129	64%
1995-96	10,302	3,946	38%
1996-97	15,966	6,778	42%

[Exhibit P-15]

PENNSYLVANIA BOARD OF PROBATION AND PAROLE

PAROLE DECISION MAKING GUIDELINES

A Statement on Policy, Procedure and Philosophy

Policy is expected to reflect decision making practice in approximately eighty percent of the decisions rendered.

* * * * *

Since the parole guidelines prescribes a decision based on the accumulation of evidence against parole, the decision maker must decide whether he concurs with policy, or wishes to make an exception to policy, using the final decision making table on page 4.

* * * * *

Thus, although discretion is structured in the decision making guideline format, the decision maker must still make their own judgments on individual cases. This feature of decision making guidelines underscores the reality that the structuring of discretion does not eliminate it; the burden of the decision remains with the decision maker to evaluate the merit of each case.

* * * * *

These guidelines have been revised four times since inception as explicit policy for decision making. In this way, policy remains adaptable and relevant to changing conditions.

[Exhibit P-16]

PAROLE DECISION MAKING GUIDELINES
A SPECIAL REPORT
Prepared for
the
HOUSE JUDICIARY COMMITTEE

PENNSYLVANIA BOARD OF PROBATION AND PAROLE

FRED W. JACOBS
CHAIRMAN

By
Management Information Division
James Alibrio, Director
George Sullivan, Research

May 16, 1991

* * * * *

The Board's decision making guidelines allow for decisions outside the guideline recommendation. Recent guideline decisions have been found to have a 79% conformity rate. Some 21% of the decisions are outside the guidelines. These decisions require written explanation to justify the policy exception. In some instances, the incidence of known characteristics are too few in number to make a measurable statistical difference in the development a guideline criterion. Consequently, they may be excluded from the guideline not because they are unimportant, but due to their relative rarity .

This underscores another important aspect of guidelines: they can not account for everything, but only those factors which are generally prevalent in the population in need of classification. The decision makers, armed with expertise on exceptions, consider objectively unique but consequential characteristics which come before them. It is this aspect of decision making that justifies the need for clinical assessment and decisions which deviate from guideline assessed norms.

* * * * *

The Parole Prognosis Assessment if a statement on the probabilities of failure for each group; they determine the expected rate of failure but do not decide which offender will fail or succeed. ... The Parole Prognosis Assessment is intended to guide the decision maker but not dictate the decision.

9. How have the PBB's guidelines been validated? What "academic" or "rigorous" studies have been conducted since their inception to validate their accuracy and appropriateness?

The Board's Parole Decision Making Guideline is an active policy instrument which receives continual review and reassessment to keep it current with changing priorities and new conditions. The objective of an ongoing program of research and development is to insure that the guidelines are an accurate reflection of policy in practice....

* * * * *

13. What is the rate of guidelines overrides, that is, cases in which the Board overrides the guidelines score bases on "subjective" review of the case? ...

There have been two studies conducted which address the matter of override rate. The first was completed in May 1985....

* * * * *

Overall, there were 378 out of 1,657 or 23% who were overrides or whose actual decision was contrary to the guidelines recommendation; and 77% who were within the guidelines. ...

The most recent study of guidelines-decision consistency was published in June 1989....

* * * * *

The overall guidelines override rate was 317 cases out of 1,504 or 21%. The corresponding guidelines conformity rate was 79%.